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Supreme Court, U.S.
FILED

No. 10- 10-252 AUG 19 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
CAROL WEHLE, EXECUTIVE DIRECTOR
UNITED STATES OF AMERICA
U.S. SUGAR CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act ("CWA") unambiguously prohibits the "addition" of any pollutants to "navigable waters" without a National Pollutant Discharge Elimination System ("NPDES") permit. The "unitary waters" theory – discussed and questioned by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*") – posits that all of the "navigable waters" of the United States constitute a single body such that the transfer of water from any one body of "navigable waters" to any other could never be an "addition" within the meaning of the statute. The Environmental Protection Agency ("EPA") Regulation at issue in this case adopts the "unitary waters" theory.

The question presented is whether the Eleventh Circuit's decision according deference to the EPA's "unitary waters" theory Regulation is contrary to the CWA's unambiguous language, which, as this Court suggested in *Miccosukee*, prohibits the transfer or discharge of a pollutant from one meaningfully distinct body of water to another without a NPDES permit; and whether the court of appeals' decision violates the separation of powers doctrine by effectively allowing the manipulation of a federal lawsuit by an agency of the Executive Branch.

PARTIES

Petitioner (Intervenor-Plaintiff Below):

The Miccosukee Tribe of Indians of Florida is the petitioner here. The Friends of the Everglades; Florida Wildlife Federation; and Fishermen Against Destruction of the Environment, all of which were plaintiffs below, have also submitted a separate petition for certiorari in this matter.[1]

Respondents (Defendants Below):

The South Florida Water Management District; its Executive Director, Carol Wehle, in her official capacity; the United States Sugar Corporation; and the United States of America are the respondents. The South Florida Water Management District and Ms. Wehle were defendants before the district court. United States Sugar and the federal government were intervenor-defendants below.

CORPORATE DISCLOSURE STATEMENT

The Miccosukee Tribe of Indians of Florida has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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1. The Friends of the Everglades et al. submitted their separate petition to the Court on August 5, 2010. Justice Thomas granted the Miccosukee Tribe of Indians of Florida an extension of time, until August 19, 2010, to submit this petition for certiorari.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. Certiorari Should Be Granted Because The Eleventh Circuit's Decision, Which Is Contrary To The CWA's Unambiguous Permit Requirements, Is Inconsistent With This Court's Decision In *Miccosukee* Requiring Permits, As Well As With The Decisions Of Other Circuits Regarding The "Unitary Waters" Theory	10

Contents

Page

II. Certiorari Should Be Granted Because The Eleventh Circuit Accorded Deference To The EPA's Regulation Contrary To This Court's Decisions 13

A. The EPA's interpretation is not entitled to deference because the CWA is unambiguous 13

B. The EPA's interpretation is not entitled to deference because the theory underlying it has been unanimously rejected by the courts 21

C. The EPA's interpretation is not entitled to deference because it is merely a losing litigation position that was subsequently codified in the course of this case 24

III. Certiorari Should Be Granted To Decide The Important Question Of Whether The Eleventh Circuit's Deference To The EPA's Regulation Violates Separation Of Powers Principles 28

CONCLUSION 34

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit, Dated And Filed June 4, 2009 ..... 1a

Appendix B — Final Judgment Of The United States District Court For The Southern District Of Florida, Dated June 14, 2007 And Filed June 15, 2007 ..... 39a

Appendix C — Order On Remedies Of The United States District Court For The Southern District Of Florida, Dated June 14, 2007 And Filed June 15, 2007 ..... 41a

Appendix D — Order Of The United States District Court For The Southern District Of Florida, Dated And Filed December 11, 2006, Setting Forth Findings Of Fact And Conclusions Of Law 53a

Appendix E — Order Of The United States Court Of Appeals For The Eleventh Circuit, Dated And Filed May 7, 2010, Denying The Petition For Rehearing En Banc 203a

Appendix F — Relevant Statutes 205a

Appendix G — Relevant Regulation 213a

TABLE OF AUTHORITIES

Page

CASES

Alaska Department of Environmental Conservation v. E.P.A., 540 U.S. 461 (2004) 31

Auer v. Robbins, 519 U.S. 452 (1997) 25

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002) 13, 14, 15

Barnhart v. Walton, 535 U.S. 212 (2002) 26, 27

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 24, 25, 26

Case of Hayburn, 2 U.S. 408 (1792) 32

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) ..... *passim*

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006) ..... *passim*

Catskill Mountains Chapter of Trout Unlimited, Inc. v. E.P.A., 630 F. Supp. 2d 295 (S.D.N.Y. 2009) 6

Authorities

Page

Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984) 13, 19, 24

Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103 (1948) 31, 33

Chock Full O'Nuts Corp. v. United States, 453 F.2d 300 (2d Cir. 1971) 25

Clark v. United States, 2007 WL 2142652 (Fed. Cl. Ct. July 17, 2007) 30

Dubois v. United States Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 11-12, 18, 21

Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008) 25

French v. Miller, 530 U.S. 327 (2000) 29

Friends of the Everglades v. E.P.A., No. 08-13652-C (11th Cir.) 6

Friends of the Everglades v. South Florida Water Management District, 570 F.3d 121 (11th Cir. 2009) ..... *passim*

Authorities

Page

Friends of the Everglades v. South Florida Water Management District, 605 F.3d 962 (11th Cir. 2010) 7

Friends of the Everglades, Inc. v. South Florida Water Management District, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006) .. *passim*

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) 30

Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996) 14

In re Swanson, 540 F.3d 1368 (Fed. Cir. 2008) 31

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 18

Koshland v. Helvering, 298 U.S. 441 (1936) 13

Loving v. United States, 517 U.S. 748 (1996) 28

Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004) 24

Authorities

Page

Morrison v. National Australia Bank Ltd.,
130 S. Ct. 2869 (2010) 23

Mova Pharmaceutical Corp. v. Shalala,
140 F.3d 1060 (D.C. Cir. 1998) 24

National Cable & Telecommunications Association v. Brand X Internet Services,
545 U.S. 967 (2005) 19, 20, 33

N.L.R.B. v. United Food & Commercial Workers Union, Local 23, AFL-CIO,
484 U.S. 112 (1987) 24

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 28, 30, 31, 32

Rapanos v. United States,
547 U.S. 715 (2006) 18

Robertson v. Seattle Audubon Society,
503 U.S. 429 (1992) 28

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996) 26

Smith v. Scott,
223 F.3d 1191 (10th Cir. 2000) 14

Authorities

Page

South Florida Water Management District v. Miccosukee Tribe of Indians,
541 U.S. 95 (2004) ..... *passim*

Town of Deerfield, New York v. F.C.C.,
992 F.2d 420 (2d Cir. 1993) 32

United States v. Klein,
80 U.S. 128 (1871) 28, 29, 30, 31

United States v. Mead Corp.,
533 U.S. 218 (2001) 24

United States v. Morton,
467 U.S. 822 (1984) 26

United States v. Padelford,
76 U.S. 531 (1869) 29

United States v. Sioux Nation of Indians,
448 U.S. 371 (1980) 28-29

Volkswagenwerk Aktiengesellschaft v. Federal Marine Commission,
390 U.S. 261 (1968) 13

Authorities

Page

STATUTES AND RULES

Statutes

28 U.S.C. § 1254 1

33 U.S.C. § 1251 6

33 U.S.C. § 1311 2

33 U.S.C. § 1313 22

33 U.S.C. § 1331 3

33 U.S.C. § 1342 2

33 U.S.C. § 1361 16

33 U.S.C. § 1362 ..... 2, 4, 15, 16, 19

33 U.S.C. § 1365 3

Rules and Regulations

40 CFR 122.3 ..... 2, 7

40 CFR 122.45 22

71 Fed. Reg. 32889 2

71 Fed. Reg. 32891 17

73 Fed. Reg. 33697 ..... 2, 6, 10

Petitioner Miccosukee Tribe of Indians of Florida respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which afforded deference to an absurd administrative interpretation of the CWA on the basis of an EPA Regulation that was adopted for the purpose of overruling the district court's decision, and which is contrary to the plain and unambiguous language of the statute and in violation of the separation of powers doctrine.

OPINIONS BELOW

The Eleventh Circuit issued an opinion in this case, as well as an order denying en banc consideration. The opinion and final judgment of the court of appeals is styled, *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009) ("*Friends*"), and is included in Appendix A. The United States District Court for the Southern District of Florida's findings of fact and conclusions of law are found in the decision styled, *Friends of the Everglades, Inc. v. South Florida. Water Management District*, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006) ("*Friends*"). The district court's orders are in Appendices B, C, and D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The court of appeals entered an opinion and final judgment on June 4, 2009 (App. A). It later denied rehearing en banc by order dated May 7, 2010 (App. E). On August 3, 2010, Justice Thomas extended the time within which to file this petition for writ of certiorari, making it due on August 19, 2010.

STATUTES INVOLVED

This case involves the NPDES permitting provisions of the CWA. The CWA prohibits the discharge of any pollutant without a permit. 33 U.S.C. §§ 1311, 1342. At issue is whether, under 33 U.S.C. § 1362(12), the transfer of a pollutant from one *meaningfully distinct* body of "navigable waters" to another is a "discharge" of a pollutant within the meaning of the CWA, such that a NPDES permit must be obtained. A "discharge" of a pollutant is defined in the CWA as "any addition of any pollutant to navigable waters from any point source." *Id.* The meaning of that language was the subject of the EPA's proposed Rule (71 Fed. Reg. 32889) and final Regulation (73 Fed. Reg. 33697 and 40 CFR 122.3(i)), as well as the focus of both the district court and the court of appeals in resolving the dispute below. The relevant statutory provisions are included in Appendix F, and the EPA's final Regulation is contained in Appendix G.

STATEMENT OF THE CASE

This Petition arises from two consolidated lawsuits filed in 2002 by the Friends of the Everglades, the Fishermen Against Destruction of the Environment, and the Florida Wildlife Federation (collectively, "plaintiffs"). The lawsuits alleged that the South Florida Water Management District ("SFWMD") violated the CWA by allowing discharges of pollutants into Lake Okeechobee (the "Lake") without NPDES permits. Petitioner, the Miccosukee Tribe of Indians of Florida (the "Tribe"), intervened as a plaintiff because the back-pumping of pollutant-laden waters into the Lake without permits threatens the Tribe's environment and way of

life. United States Sugar and the federal government intervened on behalf of the defendants.[2] The district court had jurisdiction under 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a).

The Lake is a large and shallow body of water that remains "the central feature of the Everglades ecosystem and is recognized as its liquid heart." *Friends*, 2006 WL 3635465, at *7 (App. D at 70a). "It is the largest body of fresh water in the southeastern United States and the second largest freshwater lake within the continental United States." *Id.* The Lake is also considered a "navigable water," as that term is used in the CWA. *Id.* Adjacent to the Lake are a series of canals that collect polluted water drained from their respective basins. *Id.* at *12 (App. D at 81a). This canal water contains by-products of industrial, municipal, and construction activities that are conducted within the basins. *Id.* Pump stations (named "S-2," "S-3," and "S-4") are built into the dike around the Lake where it adjoins the canals. *Id.* at *13 (App. D at 84a). Massive quantities of polluted water are then moved through the pumps and discharged into the Lake. *Id.* at *14 (App. D at 86a). The Lake is a potable water source and the district court found that the discharge at issue poses a public health threat. *See id.* at *18-*19 (App. D at 97a); *see also* Order on Remedies (App. C at 45a) (back-pumping creates "significant risk" of "serious injury to humans and death to wildlife"). The issue before the district court was whether permits were required before the SFWMD could back-pump polluted canal water into the Lake.

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2. The SFWMD, United States Sugar, and the United States government, including the EPA, shall at times collectively be referred to as the "defendants."

The consolidated case was stayed pending this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*"). In *Miccosukee*, this Court decided in favor of the Tribe on the issue presented – whether a point source must be the original source of the pollutant. *Id.* at 104-05. The Court answered that question in the negative, concluding that the point source need only convey the pollutant to "navigable waters." *Id.* at 105. The Court found that no NPDES permit is required unless pollutants are transferred from one body of water to another *meaningfully distinct* body of water. *Id.* at 112. *Miccosukee* was remanded because the Court found summary judgment premature, as there remained a question of fact as to whether the bodies of water at issue were meaningfully distinct. *Id.*

In addition, the Court chose not to address the merits of the government's so-called "unitary waters" argument, which "posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an 'addition'" within the meaning of the statute.[3] *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 81 (2d Cir. 2006) ("*Catskill II*"). Although the *Miccosukee* majority and

3. In other words, under the theory "all the water bodies that fall within the Act's definition of 'navigable waters' (that is, all 'the waters of the United States, including the territorial seas,' § 1362(7)) should be viewed unitarily for purposes of NPDES permitting requirements." *Miccosukee*, 541 U.S. at 105-06.

Justice Scalia both favored leaving the "unitary waters" question for another day, the majority ruled that the government could advance the argument on remand. *Miccosukee*, 541 U.S. at 109. Justice Scalia, on the other hand, wrote separately because he believed that there was "no point in directing the Court of Appeals to consider an argument it has already rejected." *Id.* at 113 (Scalia, J., concurring in part and dissenting in part). Importantly, the Court questioned the "unitary waters" theory, noting that several NPDES provisions might be read to conflict with the "unitary waters" approach. *Id.* at 107-08.

After *Miccosukee* was decided and the stay in this case lifted, the district court held a bench trial. Using this Court's decision in *Miccosukee* as its guide, the district court determined that the Lake and the canals were in fact meaningfully distinct. In so concluding, the district court rejected the EPA's "unitary waters" theory and held that "in the absence of a NPDES permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the CWA." *Friends*, 2006 WL 3635465, at *61 (App. D at 200a). The district court arrived at this determination on the basis of statutory interpretation, concluding that the plain language of the CWA required the SFWMD to obtain permits for the operation of its pumping structures because they were "point sources" discharging "pollutants" into navigable waters. *Id.* The EPA had earlier moved for summary judgment on the "unitary waters" theory, which, if accepted, would have entitled it to judgment as a matter of law. R. 369. But the court denied that motion. R. 527 at 1. In its order following the trial, the court rejected every argument made by the defendants regarding exclusions and exemptions under the CWA, reasoning that requiring

permits for back-pumping is "consistent with the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters." *Id.* at *42 (citing 33 U.S.C. § 1251(a)) (App. D. at 133a).

After the close of trial, but before the district court entered judgment, the EPA proposed a Rule that exempted water transfers, such as those at issue here, from the permit requirements of the CWA, and defined water transfer as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening use. As with the defendants' other arguments, however, the district court ultimately rejected this one too, ruling that "[n]o agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA." *Friends*, 2006 WL 3635465, at *48 (App. D at 169a).

Subsequent to the district court's decision and while this case was pending on appeal, the EPA issued a new Regulation adopting the "unitary waters" theory and condoning the SFWMD's transfer of pollutants from one body of water to another meaningfully distinct body without a permit.[4] *See* 73 Fed. Reg. 33697-708 (June 13,

4. The final Regulation has been separately challenged in several federal district and circuit courts. The Judicial Panel on Multidistrict Litigation ordered that the circuit court challenges be litigated in the Eleventh Circuit, *see Friends of the Everglades v. E.P.A.*, No. 08-13652-C (11th Cir.), and stayed pending the decision of the court of appeals in this case. The district court lawsuits have also been stayed. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. E.P.A.*, 630 F. Supp. 2d 295 (S.D.N.Y. 2009)).

2008) (codified at 40 C.F.R. § 122.3(i) (hereinafter, the "Regulation") (App. G). Through this *post hoc* interpretation, the EPA ignored key portions of this Court's decision in *Miccosukee* and effectively eviscerated the permit provisions of the CWA, codifying its argument that all "navigable waters" are one.

The Eleventh Circuit agreed that "the agricultural canals and Lake Okeechobee are meaningfully distinct water bodies." *Friends*, 570 F.3d at 1216 n.4 (App. A at 10a). But instead of affirming the district court consistent with *Miccosukee*, the court of appeals reversed on the basis of the EPA's new Regulation. *Id.* at 1228 (App. A at 36a). While recognizing that the "unitary waters" theory had been uniformly rejected by courts, the Eleventh Circuit found the Regulation entitled to deference because, in its view, the statutory language was ambiguous. *Id.* at 1218-19, 1227-28 (App. A at 13a, 34a). The court of appeals declined en banc review after requesting a response on the en banc petitions and considering the case for nearly a year. *Friends of the Everglades v. South Fla. Water Mgmt. Dist.*, 605 F.3d 962 (11th Cir. 2010) (App. E).

The Tribe now seeks a writ of certiorari to review the Eleventh Circuit's decision, which is contrary to the unambiguous language of the CWA and not only conflicts with precedent from this Court and the other circuits on the issue of whether a NPDES permit is required for the discharges here, but also with the constitutional doctrine of separation of powers.

REASONS FOR GRANTING THE PETITION

In *Miccosukee*, this Court, while expressing doubts, left unanswered the question of whether the "unitary waters" theory is an incorrect construction of the CWA's permitting provisions. 541 U.S. at 107-08, 109. Likewise, in a separate opinion, Justice Scalia stressed the importance of "leaving the Government's unitary-waters theory to be considered in another case." *Id.* at 113 (Scalia, J.). This is that case.

Certiorari should be granted because the opinion of the court of appeals conflicts with the decision of this Court in *Miccosukee*, which held that conveyances that do not themselves add pollutants nevertheless require NPDES permits, and with decisions of all other circuits that have considered the "unitary waters" approach. The decision below allows discharges of pollutants into "navigable waters" of the United States without permits, in contravention of the unambiguous language and intent of the statute. The court of appeals' acceptance of the government's theory eviscerates the NPDES permitting requirement of the CWA, which, as the district court recognized, represents "the most important tool in achieving the goal of cleaning up the nation's waters." *Friends*, 2006 WL 3635465, at *42 (App. D at 133a). The court of appeals' decision will undoubtedly affect numerous discharges, allowing the movement of pollutants from contaminated and toxic canals into pristine waters. Thus, in order to settle the meaning of this important federal statute, the Court should grant review in this case.

Relatedly, certiorari is also necessary to resolve the issue of whether an agency's mid-suit promulgation of a regulation is entitled to any deference when it merely sets forth a previously-argued and previously-rejected litigation position. As we have here, an agency's codification of a losing litigation position is suspect and not attendant with the usual indicia of reliability. In deferring to the EPA's Regulation in this case, the court of appeals disregarded this fact as not important. In so doing, it departed from this Court's instruction that administrative interpretations tantamount to amorphous litigation positions carry little, if any, weight and that deference is not due when a statute is clear.

Further, the Court should grant review because the EPA's promulgation of the Regulation, in order to force deference to its previously-rejected litigation position, violates the separation of powers doctrine in two respects: first, because it allows an agency of the Executive Branch to prescribe a rule of decision without amending applicable law; and second, because the judgments of Article III courts are not answerable to, and cannot be altered by, an agency of a coordinate branch of government.

Thus, in addition to important issues regarding the interpretation of the CWA and the plain meaning of the NPDES permitting provisions, this case presents an exceptional question about how far the government may go to shroud an untenable and rejected interpretation of a federal statute with apparent legitimacy, through an eleventh hour Regulation designed to alter the lawsuit's outcome.

I. Certiorari Should Be Granted Because The Eleventh Circuit's Decision, Which Is Contrary To The CWA's Unambiguous Permit Requirements, Is Inconsistent With This Court's Decision In *Miccosukee* Requiring Permits, As Well As With The Decisions Of Other Circuits Regarding The "Unitary Waters" Theory

Certiorari should be granted because the Eleventh Circuit's interpretation of the CWA's NPDES permitting provisions is inconsistent with this Court's decision in *Miccosukee*, which recognized that NPDES permits are required for discharges of pollutants where bodies of water are meaningfully distinct.

Miccosukee found that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Miccosukee*, 541 U.S. at 105. The EPA's Regulation contradicts this holding by exempting conveyances of "navigable waters" from permitting requirements so long as nothing is added to the water en route to the transferring destination. The EPA explained that, under the final Regulation, permits are required only for "pollutants introduced by the water transfer activity itself to the water being transferred," and that the scope of the required NPDES permits would be only for those "added pollutants." *See* 73 Fed. Reg. 33697, 33705 (June 13, 2008) (responding to public comments). This is another way of saying that a permit is required only if the point source is the original source of the pollutant – a position directly rejected by *Miccosukee*'s holding. In fact, the EPA's explanation shows that its interpretation is directly contrary to *Miccosukee*: "Such a permit would

not require the water transfer facility to address pollutants that may have been in the donor waterbody and are being transferred." *Id.*

The Eleventh Circuit agreed with the district court that the canals and the Lake were meaningfully distinct bodies of water under the CWA. *Friends*, 570 F.3d at 1216 n.4 (App. A at 10a). Consistent with *Miccosukee*, therefore, NPDES permits were required for the back-pumping. *See Catskill II*, 451 F.3d at 82 ("*Miccosukee* held that if the canal and the wetlands are not meaningfully distinct water bodies – an unresolved factual question – no NPDES permit is required."); *Friends*, 2006 WL 3635465, at *37 ("[T]he [*Miccosukee*] Court held that the water transfer activities only required a NPDES permit if they transferred water (and pollutants) from one body of water to another meaningfully distinct body of water.") (App. D at 143a). The Eleventh Circuit's contrary finding, and its deference to the EPA's Regulation, thus creates a conflict with *Miccosukee*. This conflict in the interpretation of an important federal statute, as well as the unprecedented environmental damage that will result as a consequence of the decision below, makes this an issue of exceptional importance meriting certiorari review.

So does the fact that the EPA's interpretation conflicts with precedent from the First and Second Circuits. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*"); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d

1273 (lst Cir. 1996). In *Dubois*, the First Circuit noted the problem with the interpretation advanced by the EPA in the Regulation here: under the "unitary waters" theory, a river so polluted that "[i]t emitted an overwhelming odor and was known to peel the paint off buildings located on its banks" would be allowed to discharge into a pond irrespective of the river's pollution and no matter how pristine the pond. *Dubois*, 102 F.3d at 1297. The First Circuit concluded that Congress could not have intended such an "irrational result." *Id.* Similarly, in *Catskill II*, the Second Circuit rejected the "unitary waters" theory (and every basis argued in support of it), finding that nothing in the text of the CWA supports inter-basin transfers of pollutants without permits. *See Catskill II*, 451 F.3d at 84-85; *see also Friends*, 2006 WL 3635465, at *48 (App. D at 169a). Like the First Circuit, the Second Circuit concluded that the EPA's interpretation "would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the CWA's NPDES requirement." *Catskill II*, 451 F.3d at 81 (citing *Catskill I*, 273 F.3d at 493). Yet in this case, remarkably, the Eleventh Circuit concluded that such an interpretation was reasonable.

Thus, by countenancing the EPA's interpretation in the final Regulation, the court of appeals delivered a decision in conflict with the First and Second Circuits, which have described the theory underlying the agency's interpretation as irrational and absurd. Further, the Eleventh Circuit's decision conflicts with *Miccosukee*'s interpretation of the CWA and its

skepticism of the "unitary waters" approach. The district court here, as with other courts before it, rejected the "unitary waters" theory. This Court should now grant certiorari to finally resolve the issue left open by *Miccosukee*, a case that the Tribe took to this Court approximately six years ago in order to protect its homeland, the Everglades, and which remains unresolved in the district court because of the EPA's "unitary waters" theory.

II. Certiorari Should Be Granted Because The Eleventh Circuit Accorded Deference To The EPA's Regulation Contrary To This Court's Decisions

Certiorari also should be granted because, contrary to prior Supreme Court precedent, the court of appeals erroneously accorded deference to the EPA's Regulation under *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

A. The EPA's interpretation is not entitled to deference because the CWA is unambiguous

This Court has said that "[i]n the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (citing *Chevron*, 467 U.S. at 842-43).[5] No *Chevron* deference

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5. *See also Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 272 (1968) (courts should not affirm administrative decisions which are inconsistent with a statute); *Koshland v. Helvering*, 298 U.S. 441, 446-47 (1936) (a regulation cannot amend a statute's unambiguous provisions).

was owed to the EPA's absurd interpretation because the statute's permitting requirement is unambiguous, just as the district court found. *See Friends*, 2006 WL 3635465, at *48 ("[T]he undersigned finds that the statute is unambiguous. No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA.") (App. D at 169a); *see also Catskill II*, 451 F.3d at 84-85 (plain meaning of the word "addition" in the CWA controls).

The court of appeals strained to find ambiguity and treated as outcome determinative a Regulation that works substantive changes to the statute under the guise of "clarification." *See Smith v. Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000) (an agency cannot make substantive changes under guise of clarification). Indeed, "[t]he [EPA's] treatment of this statute is not an interpretation but a rewrite." *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996). As the Court explained in *Barnhart*:

> [The Judiciary's] role is to interpret the language of the statute enacted by Congress. This statute does not contain conflicting provisions or ambiguous language. Nor does it require a narrowing construction or application of any other canon or interpretative tool. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then,

> this first canon is also the last: 'judicial inquiry is complete.'" We will not alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and [the affected parties]. Those parties should not seek to amend the statute by appeal to the Judicial Branch.

Barnhart, 534 U.S. at 461-62 (citations omitted). That analysis aptly fits this case. If the defendants' "policy preferences" are that no permits be required for transfers between separate bodies of "navigable waters," then they must properly and within the limits of law take that battle to the "political branches," not the courts. The statute as written is unambiguous in its requirement for NPDES permits and thus no deference was owed to the EPA's Regulation.

The Eleventh Circuit's finding of ambiguity evinces a misdirected focus on the term "navigable waters" instead of "addition" in the statute. The issue in this case is whether the back-pumping of dirty canal water into the Lake constitutes a "discharge" of pollutants so as to require NPDES permits. "Discharge" includes "*any addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis supplied).

Rather than focusing upon the plain meaning of the word "addition," as the Second Circuit did in *Catskill I* and *II* and as the district court did in this case, the Eleventh Circuit shifted its focus to the term "navigable waters." *See Friends*, 570 F.3d at 1223 ("The question

is whether 'addition . . . to navigable waters' – meaning addition to 'the waters of the United States' – refers to waters in the individual sense or as one unitary whole.") (App. A at 25a). It reasoned that the statute was ambiguous because "navigable waters" did not have the word "any" in front of it:

> According to the Water District, the conspicuous absence of "any" before "navigable waters" in § 1362(12) supports the unitary waters theory because it implies that Congress was not talking about *any* navigable water, but about *all* navigable waters as a whole. The Friends of the Everglades' reading effectively asks us to add a fourth "any" to the statute so that it would read: "Any addition of any pollutant to *any* navigable waters from any point source." But we are not allowed to add or subtract words from a statute; we cannot rewrite it. Besides, if the meaning of language is plain, no alteration should be necessary to clarify it. The addition or subtraction of words indicates that the unaltered language is not plain.
>
> * * *
>
> There are two reasonable ways to read the § 1361(12) language "any addition of any pollutant to navigable waters from any point source." One is that it means "any addition . . . to [any] navigable waters;" the other is that it means "any addition . . . to navigable waters [as a whole]." As we have held before,

> "the existence of two reasonable, competing interpretations is the very definition of ambiguity."

Id. at 1224, 1227 (citations omitted; emphasis original) (App. A at 28a, 36a). Notably, the EPA did not rely on the "absent any" argument that the Eleventh Circuit panel found so dispositive, and this curious disconnect between the agency's rationale and the court of appeals' decision clearly undermines the argument for deference.

Moreover, what the court of appeals ignored is the plain meaning of the term "any addition." As the district court and Second Circuit found, that term unambiguously means that permits are required whenever there is something added to a body of "navigable waters," and this Court held in *Miccosukee* that the "addition" must be from another meaningfully distinct body of water. The district court explained as follows:

> "Addition" is defined as the "joining of one thing to another." Webster's Third International Dictionary Unabridged, p. 24 (1993). Although the EPA states "that it is reasonable to interpret 'addition' as not generally including the mere transfer of waters from one water of the U.S. to another," it offers no sound explanation in support of its strained definition of the term. 71 Fed. Reg. 32891. Notwithstanding Defendants' protestations to the contrary, it is evident that "addition . . . to the waters of the United States" contemplates an addition from

> anywhere outside of the receiving water, including from another body of water.

Friends, 2006 WL 3635465, at *42 (citations omitted) (App. D at 133a). Similarly, the Second Circuit found that "[g]iven the ordinary meaning of the CWA's text," the government's "unitary waters" theory offers "an interpretation [that] is inconsistent with the ordinary meaning of the word 'addition.'" *Catskill I*, 273 F.3d at 493; *see also Dubois*, 102 F.3d at 1297-99 (discussing meaning of "addition"). Thus, both of those courts found that "addition" was the relevant term and that a permit is required if pollutants are transferred from one body of water to another meaningfully distinct body. *Miccosukee*, 541 U.S. at 112. In focusing on the term "navigable waters" instead of "any addition," the Eleventh Circuit incorrectly found ambiguity where there is none.

Clearly, "navigable waters" is used in the statute as a jurisdictional term to identify those bodies of water that are subject to federal regulation. *See, e.g., Rapanos v. United States*, 547 U.S. 715 (2006) (discussing jurisdictional significance and scope of "navigable waters"); *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (discussing "definition of 'navigable waters' as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause"). The CWA merely requires that the destination waters (that is, the waters into which a discharge occurs) are "navigable," or "waters of the United States," so as to ensure they are subject to Congress's authority to regulate under the Commerce Clause. The originating location or character of the

waters being discharged into "navigable waters" is simply irrelevant under the statute. As explained, all that matters for purposes of determining whether there is a "discharge" of pollutants such that a permit is required, is whether there has been "any addition" of pollutants from another meaningfully distinct body of water. That the CWA contains a scheme of provisions focusing upon the water quality standards of individual bodies strongly supports this reading of the statute.[6] *See Miccosukee*, 541 U.S. at 106-07. Thus, the term "addition" was not ambiguous; and, consequently, there was no basis for the Eleventh Circuit to defer to the EPA's construction.

Moreover, the prior court decisions finding the statute unambiguous control over the EPA's subsequent interpretation, pursuant to this Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). *Brand X* held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that *its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.*" *Id.* at 982 (emphasis supplied). In other

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6. So too does the fact that the term "dredged spoil" is part of the definition of "pollutant" under 33 U.S.C. § 1362(6). "Dredged spoil" inherently comes from other "navigable waters"; and yet when it is discharged, a permit is required. *See* Petition for Writ of Certiorari by Friends of the Everglades et al. at 22-23. Thus, the EPA's "unitary waters" theory is inconsistent with the very definition of "pollutant" under the CWA.

words, "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-83.

Because prior decisions left "no gap for the agency to fill," the court of appeals owed no deference to the agency's interpretation here. *Id.* Prior court decisions found that the "unitary waters" theory conflicts with the plain language of the statute. *See Catskill II*, 451 F.3d at 85 (repeatedly indicating that its decision was mandated by "the text of the CWA" and the statute's "plain language"); *Friends*, 2006 WL 3635465, at *48 ("[T]he undersigned finds that the statute is unambiguous. No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA.") (App. D at 169a). In *Catskill I* and *II*, for example, the Second Circuit, like the district court in this case, found that the word "addition" plainly meant permits were required whenever there is a transfer of water from one meaningfully distinct body to another. *See Catskill II*, 451 F.3d at 84-85. Thus, consistent with *Brand X*, those prior interpretations of the statute's plain language should trump the EPA's contrary construction in the Regulation.[7]

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7. One ancillary question left after *Brand X* "to bedevil the lower courts," 545 U.S. at 1018 (Scalia, J., dissenting), is readily apparent here and should be resolved by this Court – *i.e.*, the force that prior judicial determinations of no ambiguity *by a sister circuit* carry under *Brand X*'s agency-reversal rule.

B. The EPA's interpretation is not entitled to deference because the theory underlying it has been unanimously rejected by the courts

Deference was also inappropriate because the Regulation is based on a theory that has been uniformly rejected by every court to have considered its merits. As the Eleventh Circuit itself recognized, even this Court has cast doubt on the "unitary waters" theory, albeit without definitively deciding the issue:

> The unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate. Even the Supreme Court has called a strike or two on the theory, [but] . . . [t]he Court has not, however, called the theory out yet.

Friends, 570 F.3d at 1217-18 (citing, among others, *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 83; *Dubois*, 102 F.3d at 1296; *Miccosukee*, 541 U.S. at 107) (App. A at 12a).[8]

In *Miccosukee*, this Court referred to the "unitary waters" theory with skepticism and noted its tension with other statutory provisions and regulations:

> [S]everal NPDES provisions might be read to suggest a view contrary to the unitary

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8. The Eleventh Circuit also acknowledged that a prior panel of that court had at "one time decided to reject" the "unitary waters" theory as well, "but that decision was vacated" when this Court granted certiorari in *Miccosukee*. *See Friends*, 570 F.3d at 1218 (App. A at 13a).

> waters approach. . . . This approach [under 33 U.S.C. §§ 1313(c)(2)(A) and (d)] suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.
>
> The Government also suggests that we adopt the "unitary waters" approach out of deference to a longstanding EPA view that the process of "transporting, impounding, and releasing navigable waters" cannot constitute an "'addition'" of pollutants to "'the waters of the United States.'" But the Government does not identify any administrative documents in which EPA has espoused that position. Indeed, an *amicus* brief filed by several former EPA officials argues that the agency once reached the opposite conclusion. The "unitary waters" approach could also conflict with current NPDES regulations [including, for example 40 C.F.R. § 122.45(g)(4)]. . . . *The NPDES program thus appears to address the movement of pollutants among water bodies*, at least at times.

541 U.S. at 107-08 (citations omitted; emphasis supplied).

As the *Miccosukee* decision suggests, the "unitary waters" theory in fact presents a problematic interpretation that is incompatible with several provisions of the CWA – including, notably, the entire group of provisions aimed at water-body-specific "water quality standards." *Miccosukee*, 541 U.S. at 106-07; *see also Catskill II*, 451 F.3d at 81. Nevertheless,

contrary to all circuits that have decided the issue, the Eleventh Circuit panel concluded that the CWA was ambiguous with regard to the requirements for NPDES permits and then afforded deference to the final Regulation that codified this absurd theory.

This Court recently said that "[w]e need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S.Ct. 2869, 2887, (2010). In *Morrison*, the Court rejected the SEC's interpretation because it relied on the flawed reasoning of "cases we disapprove" and therefore "we owe [the agency's position] no deference." *Id.* at 2887-88. The same holds true in this case. The court of appeals acknowledged that the "unitary waters" theory, upon which the Regulation is based, was rejected by every circuit to have considered it and was questioned by this Court in *Miccosukee*. Indeed, the opinion below concludes that "all of the existing precedent and the statements in our own vacated decision are against the unitary waters theory," adding that, "[i]f nothing had changed, we might make it unanimous." *Friends*, 570 F.3d at 1218 (App. A at 13a). Those prior decisions rejecting the "unitary waters" theory as untenable were rendered on the basis of "the principles of construction that courts normally employ." Accordingly, consistent with *Morrison*, the Regulation should be rejected as a baseless construction of the CWA that is entitled to no deference.

In sum, because the Eleventh Circuit has embraced a construction that is both obviously inconsistent with the CWA and contrary to decisions of other circuits, the

Court should now decide the issue it left open in *Miccosukee* and definitively rule out the "unitary waters" theory. *See, e.g., N.L.R.B. v. United Food & Comm. Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987) (deference owed only "as long as [agency's] interpretation is rational and consistent with the statute"); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (where agency's interpretation "contravenes the statute and leads to absurd and wholly unacceptable results," the court "need not defer"); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1069 (D.C. Cir. 1998) (no *Chevron* deference where "the [agency] has embarked upon an adventurous transplant operation" of the statute and its interpretation "is inconsistent with the unambiguously expressed intent of Congress").

C. The EPA's interpretation is not entitled to deference because it is merely a losing litigation position that was subsequently codified in the course of this case

In addition to the reasons above, the EPA's Regulation is due no deference because, as this Court has said, agency interpretations amounting to little more than "convenient litigating position[s]" carry little weight. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (level of deference owed to agency interpretations advanced during litigation is "near indifference"). Similarly, the Court has said that an agency's "*post hoc* rationalization[s]," which are advanced "to defend past

agency action against attack," are not subject to deference. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Bowen*, 488 U.S. at 212; *cf. FedEx Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (according deference because there was "no reason to assume the agency's position . . . was framed for the specific purpose of aiding a party in this litigation"). Consistent with these principles, an agency "may not take advantage of [its] power to promulgate retroactive regulations during the course of a litigation for the purpose of providing [it]self with a defense." *Chock Full O' Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971). Yet, in this case, the EPA did just that; and the court of appeals condoned it.

After briefing on appeal, the EPA finalized the Regulation at issue here. It did so to tip the scales in its favor and alter the outcome of this federal lawsuit – something that it succeeded in doing. In merely making "official" its prior arguments, the EPA did not change the character of what was still a mere convenient litigating position – one which the district court rejected out of hand. Indeed, the Regulation itself actually quotes from the government's appellate brief to the Eleventh Circuit, thus making plain that the EPA was simply attempting to legitimize what was previously just an unpersuasive argument. *See* Petition for Writ of Certiorari by Friends of the Everglades et al. at 8. The EPA's Regulation was a game-changer in this lawsuit, and the very essence of a forbidden *post hoc* rationalization. Were it not for the EPA's Regulation, the court of appeals would not have reached the conclusion that it did.

In finding insignificant the EPA's manipulation, the Eleventh Circuit mistakenly relied upon statements from this Court's decisions in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996); *United States v. Morton*, 467 U.S. 822, 835 n.21 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). Those cases are inapposite under these facts. In *Smiley*, the Court did say that it does not "matter that the regulation was prompted by litigation, including this very suit." *Smiley*, 517 U.S. at 741. But the agency position there was not advanced as a losing argument in the lower court only to be later codified as a regulation in order to alter the outcome on appeal. Thus, *Smiley* does not control here;[9] and neither does *Morton* or *Barnhart*.

In *Morton*, there is no indication that the position embodied in the regulation was advanced as a losing litigation position only to be subsequently adopted in order to turn the tides in the case. In addition, the Court found the regulation's enactment in response to the lawsuit unproblematic because the suit had "brought to light an additional administrative problem of the type that Congress thought should be addressed by regulation," which was before not otherwise apparent. *Morton*, 467 U.S. at 836 n.21. The same cannot be said here. The EPA was well aware of the central

9. Importantly, however, *Smiley* noted the principle explained above, that "[o]f course we deny deference 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice,'" because "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect." *Smiley*, 517 U.S. at 741 (citing *Bowen*, 488 U.S. at 212). To the extent *Smiley* is relevant at all, it is for that proposition, not the one relied upon by the court of appeals.

interpretative issue in this case, as the "unitary waters" theory was nothing new and had been advanced as argument – unavailingly – in several prior cases. This fact makes the EPA's manipulation readily apparent.

Barnhart is similarly unhelpful because there, unlike here, the regulations were not adopted to effectively manipulate the case's outcome. Indeed, the agency's position carried the day before the district court and was only defeated before the Fourth Circuit, which found that the statute was unambiguous and, hence, not subject to the agency's interpretation. *Barnhart*, 535 U.S. at 216. Upon review, this Court disagreed, stating that "the statute does not unambiguously forbid the [agency's] regulation." *Id.* at 218. It then went on to find the agency's construction permissible. *Id.* at 219-20. Accordingly, when the Court refused to disregard the regulations because they were "only recently enacted . . . , perhaps in response to this litigation," *id.* at 221, it did so under circumstances completely inapposite to this case.

The court of appeals was therefore wrong to take the uncritical view that the EPA's conduct in this case could be justified, and excused, by reference to this Court's prior decisions. It quite simply cannot.

III. Certiorari Should Be Granted To Decide The Important Question Of Whether The Eleventh Circuit's Deference To The EPA's Regulation Violates Separation Of Powers Principles

In deferring to the EPA's *post hoc* interpretation of the statute, the court of appeals permitted an Executive Branch agency to improperly manipulate the lawsuit's outcome. This raises separation of powers concerns.

As this Court has said, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996). The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a 'judicial Power' is one to render dispositive judgments.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995).

In this case, the EPA, by the use of its purported "interpretation" of the CWA, attempts to do what the Supreme Court has forbidden Congress to do – that is, to direct a particular decision in a case without amending the applicable law. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 436 (1992), citing *United States v. Klein*, 80 U.S. 128 (1871). In *Klein*, the Court struck down as unconstitutional a statute dictating the outcome in a pending case and requiring the decision to be made in the government's favor. *United States v.*

Sioux Nation of Indians, 448 U.S. 371, 404 (1980) (characterizing *Klein*). This Court has explained the *Klein* decision thusly:

> Klein, the executor of the estate of a Confederate sympathizer, sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion. In *United States v. Padelford*, 9 Wall. 531, 542-543, 19 L. Ed. 788 (1869), [the Court] held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. [The Court] concluded that the statute was unconstitutional because it purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it."

French v. Miller, 530 U.S. 327, 348-49 (2000) (citations omitted). A similar thing occurred here when the EPA issued its Regulation, commanding the Eleventh Circuit's deference to a rejected statutory interpretation, just so it could win the case. Indeed, by its Regulation, the agency effectively "assigned to the federal court only rubber stamp work," leaving the plaintiffs with "no judicial audience,"

for the court of appeals saw its task as merely to defer to the "unitary waters" theory, no matter how absurd it or other courts believed the interpretation to be. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 429 (1995). Moreover, the court of appeals in essence decided the pending and stayed rule challenges, leaving all parties without a judicial forum to adjudicate the validity of the Regulation. *See* n.4, *supra*.

This Court has not had occasion to address the application of *Klein* and progeny to, as we have here, an agency's promulgation of a regulation during the pendency of a case in order to alter, manipulate, or prescribe its outcome. The principle announced in *Klein* – that a coequal branch of the government cannot dictate findings or command particular results – applies equally in this setting.

While *Klein* has been somewhat limited by subsequent decisions, that limitation does not come into play here. In *Plaut*, 514 U.S. at 218, the Court said, "[w]hatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" In this case, Congress has not changed the law at all. Rather, the CWA is exactly as it was when this case began. The only change has been the EPA's Regulation, which sets forth a *post hoc* rationalization based on the government's losing litigation arguments in order to alter the case's outcome. Thus, there is a viable separation of powers question under *Klein*, even as limited by its progeny. *Cf. Clark v. United States*, 2007 WL 2142652, at *6 (Fed. Cl. Ct. July 17, 2007) ("While

the government is correct that *Klein* has been limited by subsequent Supreme Court decisions, . . . the government's analysis ignores the unique circumstances of the present case . . . . Neither the Supreme Court nor any Circuit . . . has had the opportunity to opine on the application of *Klein* in such a circumstance . . . . For that reason, *Klein* continues to pose a constitutional question[.]"). Accordingly, certiorari should be granted to consider this important separation of powers question.

And the separation of powers doctrine is implicated in another respect as well: The power of the federal courts is not subject to usurpation by an agency of the Executive Branch. *See, e.g., Plaut*, 514 U.S. at 218 ("The second type of unconstitutional restriction upon the exercise of the judicial power . . . [is] that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.").[10] Indeed,

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10. *See also Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments . . . that are subject to later review or alteration by administrative action."); *In re Swanson*, 540 F.3d 1368, 1378-79 (Fed. Cir. 2008) ("The Supreme Court has repeatedly held that 'Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.'"). *Cf. Alaska Dep't of Envtl. Conserv. v. E.P.A.*, 540 U.S. 461, 511-12 (2004) (Scalia, J., dissenting) ("If a federal agency were to exercise an analogous power to review the decisions of federal courts, the arrangement would violate the well-established rule that the judgments of Article III courts cannot be revised by the

(Cont'd)

> if a judgment of an Article III court were subject to revision by a coordinate branch, it would not be the exercise of *judicial* power. Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the [EPA], which is a creature of the legislative and executive branches, similarly has no such power.

Town of Deerfield, N.Y. v. F.C.C., 992 F.2d 420, 428 (2d Cir. 1993) (citation omitted; emphasis original). In this case, when the court of appeals heeded the EPA's absurd interpretation of the CWA, it allowed just that to occur. The court of appeals sanctioned the EPA's use of a Regulation to do what it otherwise could not do – namely, reverse the district court's well-founded conclusions about the meaning of the CWA's permitting provisions. *See id.* (administrative agency has no power to "review judgments of an Article III court"). Thus, the court of appeals allowed the Executive Branch to manipulate the

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(Cont'd)

Executive or Legislative Branches. . . . The principle that judicial decisions cannot be reopened at the whim of the Executive or the Legislature is essential to preserving separation of powers and judicial independence."), citing *Case of Hayburn*, 2 U.S. 408, 410 n.* (1792) ("[B]y the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.") and *Plaut*, 514 U.S. at 211.

Judiciary and dictate a different outcome in a lawsuit, in violation of the separation of powers doctrine.[11]

Therefore, the Court should grant certiorari to make explicit that an agency's after-thought of a Regulation, which effectively usurps the Judiciary's function, may not be accorded deference consistent with the separation of powers doctrine.

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11. Justice Scalia raised similar concerns in his *Brand X* dissent, albeit in a slightly different factual context. There, he argued that the majority's decision allowed for "judicial decisions subject to reversal by executive officers" – a result he found "not only bizarre," but also "probably unconstitutional." *Brand X*, 545 U.S. at 1016, 1017 (Scalia, J., dissenting). In support of this view, Justice Scalia cited one of the separation of powers cases noted above, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), wherein the Court held that "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." *See Brand X*, 545 U.S. at 1017 (Scalia, J.).

CONCLUSION

For all of the important reasons explained above, the Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its decision in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED AND FILED JUNE 4, 2009

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-13829

D.C. Docket No. 02-80309-CV-CMA

FRIENDS OF THE EVERGLADES,
FLORIDA WILDLIFE FEDERATION,

Plaintiffs-
Counter-Defendants-
Appellees
Cross-Appellants,

FISHERMEN AGAINST DESTRUCTION
OF THE ENVIRONMENT,

Plaintiff-
Counter-Defendant
Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Intervenor-Plaintiff-
Counter-Defendant-
Appellee
Cross-Appellant,

Appendix A

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-
Counter-Claimant-
Cross-Appellee,

CAROL WEHLE, Executive Director,

Defendant-
Appellant,

UNITED STATES OF AMERICA,
U.S. SUGAR CORPORATION,

Intervenor-Defendants-
Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(June 4, 2009)

Before DUBINA, Chief Judge, CARNES, Circuit Judge, and GOLDBERG,* Judge.

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* Honorable Richard W. Goldberg , Judge, United States Court of International Trade, sitting by designation.

Appendix A

CARNES, Circuit Judge:

This appeal turns on whether the transfer of a pollutant from one navigable body of water to another is a "discharge of a pollutant" within the meaning of the Clean Water Act, 33 U.S.C. § 1362(12). If it is, a National Pollution Discharge Elimination System permit is required. 33 U.S.C. §§ 1311(a); 1342(a). The Act defines "discharge of a pollutant," but the meaning of that definition is itself disputed. During the course of this litigation, the Environmental Protection Agency adopted a regulation addressing this specific matter. The issue we face, after we dispose of a preliminary Eleventh Amendment question, is whether we owe that EPA regulation deference under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

I.

The unique geography of South Florida is once again before us. *See Miccosukee Tribe of Indians of Fla. v. United States*, __ F.3d __, 2009 WL 1199871, at *1 (11th Cir. May 5, 2009). Lake Okeechobee is part of that geography. Historically, the lake had an ill-defined southern shoreline because during rainy seasons it overflowed, spilling a wide, shallow sheet of water overland to the Florida Bay. "But progress came and

took its toll, and in the name of flood control, they made their plans and they drained the land."[1]

In the 1930s the Herbert Hoover Dike was built along the southern shore of Lake Okeechobee. It was intended to control flooding but failed during the hurricanes of 1947 and 1948. Congress then authorized the Central and Southern Florida Flood Project; as part of it the Army Corps of Engineers expanded the Hoover Dike and built pump stations including S-2, S-3, and S-4. Under the modern version of that project, nearly all water flow in South Florida is controlled by a complex system of gates, dikes, canals, and pump stations.

The area south of Lake Okeechobee's shoreline was designated the Everglades Agricultural Area. The Corps dug canals there to collect rainwater and runoff from the sugar fields and the surrounding industrial and residential areas.[2] Not surprisingly, those canals contain a loathsome concoction of chemical contaminants including nitrogen, phosphorous, and un-ionized ammonia. The water in the canals is full of suspended and dissolved solids and has a low oxygen content.

Those polluted canals connect to Lake Okeechobee, which is now virtually surrounded by the Hoover Dike.

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1. John Anderson, "Seminole Wind," on *Seminole Wind* (BMG Records 1992).

2. The canals are commonly called the EAA canals, and we will refer to them as the agricultural canals, although they also contain industrial and residential runoff.

Appendix A

The S-2, S-3, and S-4 pump stations are built into the dike and pump water from the lower levels in the canals outside the dike into the higher lake water. They do that by spewing water through the dike and into "rim canals" open to the lake. This process moves the water containing Agricultural Area contaminants uphill into Lake Okeechobee, a distance of some sixty feet. The pumps do not add anything to the canal water; they simply move it through pipes. At full capacity, the pumps within the S-2, S-3, and S-4 stations can each move 900 cubic feet of water per second—more than 400,000 gallons per minute. The South Florida Water Management District operates the pumping stations.

Two organizations, the Friends of the Everglades and the Fishermen Against the Destruction of the Environment, filed this lawsuit against the Water District in 2002. The plaintiffs (whom we will call collectively the Friends of the Everglades) sought an injunction to force the Water District to get a permit under the Clean Water Act's National Pollution Discharge Elimination System (NPDES) program before pumping the polluted canal water into the lake. The court allowed a number of interveners to enter the lawsuit. Asserting that the pollution of Lake Okeechobee threatens its way of life, the Miccosukee Tribe joined on the plaintiffs' side. The United States, "on behalf of" the EPA and the Corps, joined on the defense side, as did the U.S. Sugar Corporation. In an amended complaint, the plaintiffs added the Water District's executive director as a defendant.

Appendix A

In early 2006 there was a two-month bench trial in the United States District Court for the Southern District of Florida. *See Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1192-94 (11th Cir. 2009) (describing that trial). After the trial, the district court decided that the Water District was immune under the Eleventh Amendment and dismissed it from the case, but the court kept the executive director in the lawsuit under the *Ex parte Young* doctrine. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). It concluded that operating the S-2, S-3, and S-4 pump stations without an NPDES permit violated the Clean Water Act. In June 2007 the court granted an injunction against the executive director of the Water District that required her to "apply . . . for a NPDES permit forthwith." All of the defendants except the Water District appealed the part of the final judgment that enjoined the executive director, while the plaintiffs cross-appealed the part dismissing the Water District under the Eleventh Amendment.

II.

We begin with the cross-appeal, which contests the dismissal of the Water District on Eleventh Amendment immunity grounds. The parties disagree mightily about this issue and had gotten so wrapped up in the arguments about it that none of them had stepped back to ask why it matters. We asked that question of the attorneys at oral argument, and once they got past the deer-in-the-headlights moment they could offer no good reason why we, or they, should care if the Water District

is in or out of this lawsuit. We believe that it does not matter at all.

No party disputes that the executive director of the Water District has been properly sued under the *Ex parte Young* doctrine. That doctrine provides an exception to Eleventh Amendment immunity for lawsuits against state officials as long as the plaintiffs seek only prospective injunctive relief to stop ongoing violations of federal law. *See Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000). And that is all the plaintiffs in this case seek. That relief can be obtained as readily by enjoining the real-person executive director as it could be by enjoining both her and the Water District. *See* Fed. R. Civ. P. 25 (providing for automatic substitution of successors upon the death or end of term of the officer named as the original party). If anything, injunctions against real people are more easily enforced than those against corporate or government entities because real people can be put in jail.

At one time it appeared that the Eleventh Amendment issue might matter because the executive director had initially argued that some of the relief requested by the Friends of the Everglades was beyond the proper scope of the *Ex parte Young* doctrine. If true, that part of the requested relief would have been unavailable unless the Water District itself could be sued. But Jonathan Glogau, the attorney representing the Water District, conceded at oral argument that if the plaintiffs are entitled to the relief they seek, all of that

relief can be obtained by enjoining the executive director.[3] We are entitled to rely on that concession because James Nutt, the attorney representing the executive director, assured us at the beginning of the arguments that Glogau would speak on the Eleventh Amendment issue for the executive director as well as for the Water District.

Two-and-a-half weeks after oral argument, however, we received a supplemental letter from attorney Nutt in which, referring to himself in the third person, he stated: "The Executive Director's counsel did not have an opportunity to address the Court's question, posed at the very end, whether the remedies available against the Executive Director through the fiction of *Young* are the same as the remedies available as [sic] against the District were it not immune. They are not." The belated letter is not helpful. As a general matter it is conceivable that remedies available against the executive director might not match those available against the Water District, if it is not protected by the Eleventh Amendment. But we are not dealing with a general

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3. Counsel: In this case, all of the relief that [the plaintiffs] wanted, they got.

> Court: Alright, let me ask you this: Are you now conceding to this Court that under *Ex parte Young*, with the Director in, all of the relief that they are now seeking they can obtain through the Director?
>
> Counsel: Yes.
>
> Court: Okay. (OA Trans., Jan. 16, 2009)

matter. We are dealing with this particular case. The only remedies sought are prospective injunctive relief of the sort which, if granted, would be obtained through judicial process applied against the executive director, who is responsible for the operation of the Water District. *See* Fla. Stat. § 373.083.

The plaintiffs have the greatest interest in the availability of remedies. They are satisfied that, as the attorney for the Water District assured us at oral argument, "the remedies sought by Plaintiffs can be obtained against the Executive Director of the District." We are, too. To enjoin the executive director of the Water District is for all practical purposes to enjoin the Water District. And equity is practical.

An issue is moot "when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Fla. Ass'n of Rehab. Facilities, Inc.*, 225 F.3d at 1217; *see also Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 1951 (1969). To decide a moot issue is to issue an advisory opinion, one unnecessary to the judicial business at hand and outside the authority of Article III courts. *Fla. Ass'n of Rehab. Facilities*, 225 F.3d at 1216-17; *see also B&B Chem. Co. v. United States EPA*, 806 F.2d 987, 989 (11th Cir. 1986) ("A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."). To decide questions that do not matter to the disposition of a case is to separate Lady Justice's scales from her sword. That we will not do. *Cf.* George E. Allen, *The Law*

as a Way of Life, 27 (1969) ("The scales of justice without the sword is the impotence of law.").

III.

Having disposed of the Eleventh Amendment issue, we turn now to whether the S-2, S-3, and S-4 pumps require NPDES permits. The Clean Water Act bans the "discharge of any pollutant" without a permit. 33 U.S.C. §§ 1311, 1342(a)(1). "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

It is undisputed that the agricultural and industrial runoff in the canals contains "pollutants," that Lake Okeechobee and the canals are "navigable waters," and that these three pump stations are "point sources" even though they add nothing to the water as they move it along. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102, 105, 124 S. Ct. 1537, 1542-43 (2004). The question is whether moving an existing pollutant from one navigable water body to another is an "addition . . . to navigable waters" of that pollutant.[4]

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4. The permitting requirement does not apply unless the bodies of water are meaningfully distinct. *Miccosukee*, 541 U.S. at 112, 124 S. Ct. at 1547. The district court concluded that Lake Okeechobee and the agricultural canals are meaningfully distinct based on ten fact findings that it detailed at considerable length. Our review of those findings is limited to looking for clear error, *see Anderson v. City of Bessemer City*,

(Cont'd)

The district court decided that it is, but that decision came before the EPA adopted its regulation. Our review is *de novo*. *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999).

A.

The Water District's central argument is based on the "unitary waters" theory. That theory is derived from the dictionary definition of the word "addition," which is not defined in the Act. *See generally S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 376, 126 S. Ct. 1843, 1847 (2006) (stating that an undefined statutory term is to be read "in accordance with its ordinary or natural meaning.") (quotation omitted). The dictionary definition of "addition" is "to join, annex, or unite" so as to increase the overall number or amount of something. *Webster's Third New International Dictionary* 24 (1993).

(Cont'd)

470 U.S. 564, 574, 105 S. Ct. 1504, 1512 (1985), and the defendants do not even challenge them as clearly erroneous. Given the fact findings the district court made, we are satisfied that the agricultural canals and Lake Okeechobee are meaningfully distinct water bodies.

The EPA wrote an opinion letter that attempted to build a case for the waters not being meaningfully distinct. That letter is not entitled to *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000) ("Interpretations such as those in opinion letters . . . do not warrant Chevron-style deference."). *Applying Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161 (1944), we find the EPA's informal view of the term "meaningfully distinct" unpersuasively narrow.

The unitary waters theory holds that it is not an "addition . . . to navigable waters" to move existing pollutants from one navigable water to another. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters. The metaphor the Supreme Court has adopted to explain the unitary waters theory is: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Miccosukee*, 541 U.S. at 110, 124 S. Ct. at 1545-46 (alteration and quotation marks omitted). Under that metaphor the navigable waters of the United States are not a multitude of different pots, but one pot. Ladling pollution from one navigable water to another does not add anything to the pot. So no NPDES permit is required to do that.

The unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate. *See, e.g., Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York (Catskills I)*, 273 F.3d 481, 491 (2d Cir. 2001) ("[T]he transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."); *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York (Catskills II)*, 451 F.3d 77, 83 (2d Cir. 2006) (concluding that "[t]he City also reasserts the unitary-water theory of navigable waters. Our rejection of this theory in *Catskills I*, however, is . . . not undermined" by *Miccosukee*, 541

U.S. 95, 124 S. Ct. 1537); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (rejecting the idea that pollutants are 'added' only on first entry into any navigable water); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) ("[T]here is no basis in law or fact for the district court's 'singular entity' [unitary waters] theory."); *N. Plains Res. Council v. Fidelity Exploration and Dev.*, 325 F.3d 1155, 1163 (9th Cir. 2003). Even the Supreme Court has called a strike or two on the theory, stating in *Miccosukee* that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." 541 U.S. at 107, 124 S. Ct. at 1544. The Court has not, however, called the theory out yet.

We have no controlling circuit precedent on the unitary waters theory. We did at one time decide to reject it, but that decision was vacated. *See Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002) (concluding that "addition . . . to navigable waters" includes pumping polluted water from one navigable water body into another), *vacated, Miccosukee*, 541 U.S. at 112, 124 S. Ct. at 1547. Parts of decisions that are vacated and have not been reinstated "have no legal effect whatever. They are void." *United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (en banc). We are free to give statements in a vacated opinion persuasive value if we think they deserve it. *See Tallahassee NAACP v. Leon County*, 827 F.2d 1436, 1440 (11th Cir. 1987).

In *Miccosukee*, 280 F.3d at 1367, we addressed whether the law required an NPDES permit before polluted water could be moved through the S-9 pump from some particular Everglades canals into a water conservation area. In a footnote, we declined to adopt the unitary waters theory. *Id.* at 1368 n.5 ("We reject the Water District's argument that no addition of pollutants can occur unless pollutants are added from the outside world insofar as the Water District contends the outside world cannot include another body of navigable waters."). Instead we said that "the receiving body of water is the relevant body of navigable water" and that "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." *Id.* at 1368. For that proposition we cited *Catskill I*, a Second Circuit decision rejecting the unitary waters theory. Because the polluted canal water would not have flowed into the conservation area but for S-9's pumping, we concluded that S-9 was adding pollutants to a meaningfully distinct water body, so an NPDES permit was required. *Id.* at 1368-69. The Supreme Court vacated our decision and remanded for further factfindings, however, because the existing record did not convince it that the canals and the water conservation area were meaningfully distinct water bodies. *Miccosukee*, 541 U.S. at 112, 124 S. Ct. at 1547. The Court also stated that the Water District's unitary waters argument was to be available on remand. *Id.*, at 112, 124 S. Ct. at 1547.

In sum, all of the existing precedent and the statements in our own vacated decision are against the

unitary waters theory. That precedent and those statements take the view that the transfer of pollutants from one meaningfully distinct navigable body of water to another is an "addition . . . to navigable waters" for Clean Water Act permitting purposes. If nothing had changed, we might make it unanimous. But there has been a change. An important one. Under its regulatory authority, the EPA has recently issued a regulation adopting a final rule specifically addressing this very question. Because that regulation was not available at the time of the earlier decisions, they are not precedent against it. We are the first court to address the "addition . . . to navigable waters" issue in light of the regulation—to decide whether the regulation is due *Chevron* deference.

B.

The EPA's new regulation, which became final on June 13, 2008, explains that it was adopted to:

> clarify that water transfers are not subject to regulation under the National Pollution Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.

NPDES Water Transfers Rule, 73 Fed. Reg. 33,697-708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). Everyone agrees that the EPA's regulation is entitled to *Chevron* deference if it is a reasonable construction of an ambiguous statute. Under *Smiley v. Citibank*, 517 U.S. 735, 740-41, 116 S. Ct. 1730, 1734 (1996), and *United States v. Morton*, 467 U.S. 822, 835 n.21, 104 S. Ct. 2769, 2776 n.21 (1984), it does not matter that the regulation was proposed and issued well after the beginning of this lawsuit. Neither does it matter if it was done in response to this or similar lawsuits. *See Barnhart v. Walton*, 535 U.S. 212, 221, 122 S. Ct. 1265, 1271 (2002). Nor does it matter whether the new regulation is a dramatic shift in EPA policy. *Natl. Cable & Telecomm. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 2699, 162 L. Ed. 2d 820 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

All that matters is whether the regulation is a reasonable construction of an ambiguous statute. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 844, 104 S. Ct. at 2782 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *Sierra Club v. Johnson*, 541 F.3d 1257, 1265 n.3 (11th Cir. 2008) ("[A] court must give effect to an agency's reasonable interpretation of

an ambiguous statute."). In other words, there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways. Those two requirements are obviously intertwined. *See* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597 (2009); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 30 (1998) (examining 200 court of appeals cases applying *Chevron* and finding that in 28 percent of them the inquiry was collapsed into the single question of whether the interpretation was reasonable).

The Friends of the Everglades' position is that the EPA's regulation does not warrant *Chevron* deference because the meaning of the "addition . . . to navigable waters" language is clear and its lack of ambiguity forecloses the unitary waters theory. *Cf., e.g., Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1312 (11th Cir. 2002) (finding that, because "using traditional tools of statutory construction," the Nuclear Waste Policy Act provision in question was clear, no level of deference applied to the agency's contrary interpretation); *Brand X*, 545 U.S. at 982-83, 125 S. Ct. at 2700 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). The defendants have two alternative positions. Their bolder position is that the EPA's regulation mirrors the unambiguous meaning of the statute. Their more modest one is that even if the statute is ambiguous, the regulation is one

reasonable interpretation of it. The true conflict, and most of our discussion, centers on whether there is ambiguity.

C.

Both sides pitch several decisions to us. The Water District, arguing for ambiguity, throws us *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), and *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). In those cases the courts concluded that the "discharge of a pollutant" language in the Clean Water Act was ambiguous and deferred to the EPA's view that dams did not add pollutants, which meant that no NPDES permits were necessary. 862 F.2d at 584-85; 693 F.2d at 183. The issues those cases addressed, however, were different from the one before us.

In *Gorsuch* the National Wildlife Federation sued the EPA for failing to require NPDES permits for dams. 693 F.2d at 161. The man-made dams and their reservoirs caused changes in the water's temperature, nutrient loads, and oxygen content, and the affected water was then released through the dams into the rivers below. *Id.* The EPA gave two reasons why no permit was required: (1) the changes caused by the dams were not pollutants; and (2) even if they were, releasing water through a dam did not add those pollutants to the water, because the water would have reached the downstream river anyway, and its passage through the dam did not change it. *Id.* at 165. The D.C. Circuit concluded that

neither the language of the statute nor its legislative history conclusively supported either side's position about what "discharge of a pollutant" meant under the circumstances of that case, so the court deferred to the EPA's position.[5] *Id.* at 175, 183.

In doing so, the *Gorsuch* court accepted the EPA's position that colder water and changes in its oxygen and dissolved nutrient content were not pollutants at all. *Id.* at 174. That rendered irrelevant whether the changed water was being 'added' to navigable water by its movement through a dam. In any event, the water was moving from a river above a dam to the same river below it. Because the facts of the case did not present the issue of whether the transfer of pollutants from one body of water to a different body of water adds pollutants to the navigable waters, the *Gorsuch* court could not have decided that issue. *Watts v. BellSouth Telcomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."); *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) (same). It follows that the court also could not have decided whether the statutory language was ambiguous regarding that issue, which is the one before us. Language can be ambiguous in some respects but not in others.

5. *Gorsuch* predates *Chevron* but applied a substantially similar level of deference. *See* 693 F.2d at 181 ("We hold merely that EPA's interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld.").

The other decision the Water District pitches us is *Consumers Power*, 862 F.2d 580. In that case a power plant sucked water containing some unlucky fish out of Lake Michigan, pumped the water uphill, and then directed it and the fish back downhill through turbines that generated electricity. 862 F.2d at 581. In the process the turbines pureed some of the fish and spewed the fish puree back into Lake Michigan. *Id.* at 581-82. The plant was a "dam" for permitting purposes because part of the generating process involved impounding water. *Id.* at 589-90. Deferring to the EPA's position, the Sixth Circuit concluded that "any entrained fish released with the . . . facility's turbine generating water originate in Lake Michigan and do not enter the Lake from the outside world." *Id.* at 585. Fish, living or dead, are biological material under the Clean Water Act, and the fish in *Consumers Power* had always existed in the same lake to which the power plant returned them. *See id.* Accordingly, the court did not have before it, and so could not have decided, whether moving pollutants between different bodies of navigable water constitutes an addition of pollutants to navigable waters. *See Watts*, 316 F.3d at 1207.

Gorsuch and *Consumers Power* involved water that wound up where it would have gone anyway. That is not this case. Water from the agricultural canals would not flow upstream into Lake Okeechobee if the S-2, S-3, and S-4 pumps did not move it there. Here, unlike in *Gorsuch* and *Consumers Power*, pollutants are being moved

between meaningfully distinct water bodies.[6] The fact that those decisions found the statute ambiguous as applied to different factual situations is of little help to the Water District. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 950 (2002) (explaining that the inquiry as to whether a statute is ambiguous is undertaken "with regard to the particular dispute in the case"); *United States v. Santos*, __ U.S. __, 128 S. Ct. 2020, 2024 (2008) (noting that "context gives meaning" with regard to the circumstances under which a statute is ambiguous). Context means a lot.

The Friends of the Everglades, arguing against ambiguity, pitch us other decisions. *See, e.g., Catskills I*, 273 F.3d at 481; *Catskills II*, 451 F.3d at 77; *Miccosukee*, 280 F.3d at 1367, *vacated*, 541 U.S. at 112, 124 S. Ct. at 1547; *Dubois*, 102 F.3d at 1273. They argue that all of the courts of appeals that have addressed the issue have found that "any addition of any pollutant to navigable waters" includes moving polluted water between meaningfully distinct water bodies. That statement depends, however, on what one means by "the issue." Each decision the Friends of the Everglades rely on addressed which interpretation of the statutory language was most plausible or preferable. Because they all came out before the EPA's new regulation went into effect, none of those decisions addressed the issue before us, which is whether the EPA's interpretation of the statutory language is reasonable, even if we might

6. *See supra* p. 11, n.2.

prefer another one. Deciding how best to construe statutory language is not the same thing as deciding whether a particular construction is within the ballpark of reasonableness. *See Brand X*, 545 U.S. at 980, 125 S. Ct. at 2699 ("*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."); *Shotz v. City of Plantation*, 344 F.3d 1161, 1178 (11th Cir. 2003) (observing that "in the absence of an administrative interpretation," a court must impose its own construction on the statute).

Still, the Friends of the Everglades urge us to infer from the opinions in those other cases that the courts believed the Act's language unambiguously requires a permit in these circumstances, and they argue that we should be persuaded by that inference. In the *Catskills* cases, the Second Circuit held that pumping polluted water from the Schoharie Reservoir into the Esopus Creek required an NPDES permit. *Catskills I*, 273 F.3d at 489. Those water bodies were hydrologically connected; they both flowed into the Hudson River. But because of directional flow and gravity, waters from the reservoir "under natural conditions . . . would never reach Esopus Creek." *Id.* at 484. The Second Circuit stated that "[n]o one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the 'same.'" *Id.* at 492.

The Second Circuit then brushed aside the EPA's informal opinion that no permit was required. The court

cited the "ordinary meaning" of the statutory text, especially the word "addition," and called the "'singular entity' theory of navigable waters . . . . inconsistent with the ordinary meaning of the word 'addition.'" *Id.* at 493. It concluded that "none of the statute's broad purposes sways us from what we find to be the plain meaning of its text . . . We find that the textual requirements of the . . . definition of 'discharge of a pollutant' in § 1362(12) are met here." *Id.* at 494. In *Catskills II* that court confirmed its holding. In doing so, it found unpersuasive the EPA's 2005 guidance letter, which reiterated the EPA's view that a permit was not required. That letter, the court explained, "simply overlooked [the] plain language [of the statute]." 451 F.3d at 84. The letter was not entitled to, and did not receive, *Chevron*-level deference. *Id.* at 82. It only warranted and received *Skidmore* consideration for persuasive value, which is a significantly less deferential standard. *Id.*

Importantly, the Second Circuit explicitly refused to foreclose the possibility that its decision might be different if *Chevron* deference applied. 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate."). That is the situation we have here.

Our opinion in *Miccosukee* followed the same line of reasoning as the Second Circuit in the *Catskills* cases and reserved the same question, which is the question before us now. *Miccosukee*, 280 F.3d at 1367, *vacated*,

541 U.S. at 112, 124 S. Ct. at 1547. In *Miccosukee* we stated our belief that the Clean Water Act required an NPDES permit for transfers of polluted water between meaningfully distinct water bodies, but we qualified that conclusion. 280 F.3d at 1369. We pointed out that we could "ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference." *Id.* at 1368 n.4. Now there is an EPA regulation that poses the *Chevron* issue missing from the *Miccosukee* case.[7]

None of the decisions the parties have thrown our way helps either side much. The Water District's decisions found ambiguity in the relevant provision of the Clean Water Act as it applied to dams involving the same bodies of water, not to pumps transferring pollutants between meaningfully distinct bodies of water. The Friends of the Everglades' decisions, though involving the same factual context, decided only how best to construe the statutory language—not whether that language is ambiguous and could reasonably be construed another way. We turn to that issue now.

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7. The *Dubois* case is similar to *Miccosukee* and the *Catskills* cases. In *Dubois* the First Circuit held that transferring pollutants from a river to a pond required an NPDES permit because the court wanted to avoid "a watering down of Congress' clear statutory protections." 102 F.3d at 1299. However, the court did not apply *Chevron* deference, *id.* at 1285 n.15, and it does not appear that the Forest Service had promulgated a regulation that the court could have deferred to even if it had desired to do so. *Id.* at 1296-99.

Appendix A

IV.

In the first step of *Chevron* analysis we apply the traditional tools of statutory construction to ascertain whether Congress had a specific intent on the precise question before us. *See Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. at 2782 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). If Congress did, then the statute is not ambiguous and *Chevron* has no role to play. The traditional tools of statutory construction include "examination of the text of the statute, its structure, and its stated purpose." *Miami-Dade County v. United States EPA*, 529 F.3d 1049, 1063 (11th Cir. 2008); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").[8]

A.

The Clean Water Act outlaws "the discharge of any pollutant" subject to several exceptions, one of which is where an NPDES permit is obtained. 33 U.S.C. §§ 1311,

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8. Recently, we reluctantly concluded that in determining for *Chevron* purposes whether Congress had an intent on the issue at hand, we also look to legislative history. *Miccosukee*, 2009 WL 1199871 at *14. We do that on page 34, infra.

1342(a)(1). "Discharge" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Navigable waters," in turn, is defined as "the waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has recently instructed that the term "discharge of pollutants" and its definition is "of particular significance" within a "complicated statute." *S.D. Warren Co.*, 547 U.S. at 380, 126 S. Ct. at 1850.

The question is whether "addition . . . to navigable waters"—meaning addition to "the waters of the United States"—refers to waters in the individual sense or as one unitary whole. Under the Water District's unitary waters theory, "to navigable waters" means to *all* navigable waters as a singular whole. As a result, pollutants can be added to navigable waters only once, and pollutants that are already in navigable waters are not added to navigable waters again when moved between water bodies. Conversely, the Friends of the Everglades' position is that "to navigable waters" refers to each individual water body. As a result, the statute means "any addition of any pollutant to *any* navigable waters," even though those are not the words the statute uses. Under the Friends of the Everglades' reading, pollutants existing in one navigable water, like the agricultural canals, are "added . . . to navigable waters" when they are transferred into another navigable water, like Lake Okeechobee.

The common meaning of the term "waters" is not helpful. In ordinary usage "waters" can collectively refer

to several different bodies of water such as "the waters of the Gulf coast," or can refer to any one body of water such as "the waters of Mobile Bay." An "addition . . . to navigable waters" could encompass any addition to a single body of navigable water regardless of source (like water pumped from one navigable body of water to another), or it could mean only an addition to the total navigable waters from outside of them (like a factory pumping pollutants into a navigable stream). Because the statutory language could be used either way, we turn next to its immediate context.

B.

The context in which language is used is important. *See Robinson*, 519 U.S. at 341, 117 S. Ct. at 846; *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60, 125 S. Ct. 460, 467 (2004) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because the same terminology is used elsewhere in a context that makes its meaning clear . . . ."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 1300-01 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."). The Water District argues that the context of 33 U.S.C. § 1362(12) demonstrates that Congress intentionally selected each word in the definition of "discharge" to deliver a specific meaning. It asserts that the Friends of the Everglades' reading of the statute would require us to add words to the law, which is impermissible.

"Discharge" is defined in the Act as "[a]ny addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). According to the Water District, the conspicuous absence of "any" before "navigable waters" in § 1362(12) supports the unitary waters theory because it implies that Congress was not talking about *any* navigable water, but about *all* navigable waters as a whole. The Friends of the Everglades' reading effectively asks us to add a fourth "any" to the statute so that it would read: "Any addition of any pollutant to *any* navigable waters from any point source." But we are not allowed to add or subtract words from a statute; we cannot rewrite it. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596, 71 S. Ct. 515, 518 (1951) (we are not "to add nor to subtract, neither to delete nor to distort [the words]" Congress has used); *Blount v. Rizzi*, 400 U.S. 410, 419, 91 S. Ct. 423, 429 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."); *Nguyen v. United States*, 556 F.3d 1244, 1256 (11th Cir. 2009) ("We are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it . . . ."); *Albritton v. Cagle's, Inc.*, 508 F.3d 1012, 1017 (11th Cir. 2007) ("We are not empowered to rewrite statutes."). Besides, if the meaning of language is plain, no alteration should be necessary to clarify it. The addition or subtraction of words indicates that the unaltered language is not plain.

There is also the fact that Congress knows how to use the term "any navigable water[s]" when it wants to protect individual water bodies instead of navigable

waters as a collective whole. Within the Clean Water Act itself, Congress authorized the EPA to investigate "the pollution of any navigable waters," 33 U.S.C. § 1254(a)(3), and referred to the EPA's dissemination of information about changes in the flow "of any navigable waters." 33 U.S.C. § 1314(f)(2)(F). Other water protection statutes also use the term "any navigable water[s]." *See, e.g.*, 33 U.S.C. § 407 ("It shall not be lawful to throw, discharge, or deposit . . . any refuse matter . . . into any navigable water of the United States. . ."); 33 U.S.C. § 419 ("The Secretary of the Army is authorized . . . to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredgings, earth, garbage, and other refuse materials . . ."); 33 U.S.C. § 512 ("No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States."). The common use by Congress of "any navigable water" or "any navigable waters" when it intends to protect each individual water body supports the conclusion that the use of the unmodified term "navigable waters" in § 1362(12) (or the use in its definition, "the waters of the United States," at § 1362(7)) means the waters collectively. *See Delgado v. United States Att'y Gen.*, 487 F.3d 855, 862 (11th Cir. 2007) ("[W]here Congress knows how to say something but chooses not to, its silence is controlling.") (quotation marks omitted); *DirecTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004) ("[W]hen Congress uses different language in similar sections, it intends different meanings.") (quoting *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000).

That context does not, however, establish that the meaning of the statutory language is clear. Although Congress did use the term "any navigable waters" in the Clean Water Act to protect individual water bodies, it also used the unmodified "navigable waters" to mean the same thing. For example, as the Supreme Court noted in *Miccosukee*, 541 U.S. at 107, 124 S. Ct. at 1544, the Act discusses the states' creation of water-body-specific quality standards based on "the designated uses of the navigable waters involved." 33 U.S.C. § 1313(c)(2). In that context "the navigable waters" must refer to many individual water bodies—exactly what the Friends of the Everglades contend that it means in 33 U.S.C. § 1362(12) ("Any addition of any pollutant to navigable waters . . ."). *See also Miccosukee*, 541 U.S. at 106-07, 124 S. Ct. at 1544 (citing § 1313(c)(2) and stating that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach.").

The result so far is that we are not persuaded that the meaning of the statutory provision at issue, read either in isolation or in conjunction with similar provisions, is plain one way or the other. The statutory context indicates that sometimes the term "navigable waters" was used in one sense and sometimes in the other sense.

C.

The "broader context of the statute as a whole" does not resolve the ambiguity. *Robinson*, 519 U.S. at 341, 117 S. Ct. at 846; *Koons Buick*, 543 U.S. at 60, 125 S.

Ct. at 467 (explaining that a seemingly ambiguous provision may be clarified by the broad context of the statute if "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The general purpose of the Clean Water Act is broad and ambitious:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter— (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. . . .

33 U.S.C. § 1251(a). The NPDES permitting program is the centerpiece of the Clean Water Act. *See, e.g., Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997); *Gorsuch*, 693 F.2d at 175-76 ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution."). In light of the sweeping goals of the Act, the Senate Conference Report states that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation . . .".[9] S. Conf. Rep. 92-1236

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9. That statement appears intended to extend the application of the Clean Water Act to cover as much water as the Commerce Clause would allow. *See generally Rapanos*, 547

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(1972), *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. The Friends of the Everglades argue that, for two reasons, the Clean Water Act's ambitious anti-pollution goals make it absurd to read the Act as implicitly creating a sizeable exception to the NPDES permitting program for pollutants that come from other navigable waters.

First, they assert that the permitting program itself is designed to protect individual water bodies. State water quality standards, which are specific to individual water bodies, are intertwined with the NPDES permitting process. If a water body fails to meet the state water quality standards, the government alters the terms of the NPDES permits held by contributing point sources in order to ratchet down the load of pollutants that may be pumped into that water body. *Miccosukee*, 541 U.S. at 107, 124 S. Ct. at 1544; 33 U.S.C. § 1313(d). Given the permitting requirement's role in maintaining individualized water quality standards, the Friends of the Everglades argue that it would make little sense to allow uncontrolled, un-permitted pumping between navigable waters that could have different quality standards. Lake Okeechobee, for example, is classified as drinking water under the state water quality standards. Pumping dirty agricultural canal water into the lake makes it more difficult to meet the lake's quality standards. To allow such pumping without a permit

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U.S. at 715, 126 S. Ct. at 2208. The question before us is not the constitutional reach of the Act but the meaning of specific statutory language where the Act does apply.

tends to undermine the goals of the NPDES program. The Friends of the Everglades argue that the unitary waters theory, which would exclude from the permitting requirement the pumping of pollutants into the lake, is an unreasonably narrow reading of the Act.

Second, the Friends of the Everglades argue that reading the statute to protect only the navigable waters as one unitary whole could lead to results even more absurd than pumping dirty canal water into a reservoir of drinking water. If an "addition . . . to navigable waters" occurs only at a pollutant's first entry into navigable waters, and never again when it is transferred to a different water body, then the NPDES program— the centerpiece of the Clean Water Act— would require no permit for a project to pump the most loathsome navigable water in the country into the most pristine one.

These horrible hypotheticals are frightening enough that we might agree with the Friends of the Everglades that the unitary waters theory does not comport with the broad, general goals of the Clean Water Act. *See generally* 33 U.S.C. § 1251(a) ("to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). But we "interpret and apply statutes, not congressional purposes." *In re Hedrick*, 524 F.3d 1175, 1188 (11th Cir. 2008); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S. Ct. 998, 1002 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Norfolk Southern R. Co. v.*

Sorrell, 549 U.S. 158, 171, 127 S. Ct. 799 (2007) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.") (citation omitted). And there are other provisions of the Clean Water Act that do not comport with its broad purpose of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. (Which may help explain why the Act's express goal of completely eliminating all discharge of pollutants into the navigable waters by 1985 was not met.)

No one disputes that the NPDES program is restricted to point sources. Non-point source pollution, chiefly runoff, is widely recognized as a serious water quality problem, but the NPDES program does not even address it. *See generally Rapanos*, 547 U.S. at 777, 126 S. Ct. at 2247 (Kennedy, J., concurring) (observing that agricultural runoff from farms along the Mississippi River creates an annual hypoxic 'dead zone' in the Gulf of Mexico that is nearly the size of New Jersey); *Oregon Natural Desert Ass'n v. United States Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) (stating that the "disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the [Clean Water] Act"). Not only are ordinary non-point sources outside the NPDES program, but Congress even created a special exception to the definition of "point source" to exclude agricultural storm water discharges and return flows from irrigation, despite their known, substantially harmful impact on water quality. 33 U.S.C. § 1362(14).

The point is that it may seem inconsistent with the lofty goals of the Clean Water Act to leave out of the permitting process the transfer of pollutants from one navigable body of water to another, but it is no more so than to leave out all non-point sources, allowing agricultural run-offs to create a huge "dead zone" in the Gulf of Mexico. Yet we know the Act does that. What this illustrates is that even when the preamble to legislation speaks single-mindedly and espouses lofty goals, the legislative process serves as a melting pot of competing interests and a face-off of battling factions. What emerges from the conflict to become the enactment is often less pure than the preamble promises. The provisions of legislation reflect compromises cobbled together by competing political forces and compromise is the enemy of single-mindedness. It is not difficult to believe that the legislative process resulted in a Clean Water Act that leaves more than one gap in the permitting requirements it enacts. *Wyeth v. Levine*, __ U.S. __, 129 S. Ct. 1187, 1215-16 (2009) (Thomas, J., concurring) ("Legislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law's enactment.") (quotation omitted); *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74, 106 S. Ct. 681, 688-89 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. . . . the final language of the legislation may reflect hard-fought compromises.").

As the Supreme Court once said, "[a]fter seizing every thing from which aid can be derived we are left with an ambiguous statute." *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522 (1971) (internal citation and alteration omitted). There are two reasonable ways to read the § 1361(12) language "any addition of any pollutant to navigable waters from any point source." One is that it means "any addition . . . to [any] navigable waters;" the other is that it means "any addition . . . to navigable waters [as a whole]." As we have held before, "the existence of two reasonable, competing interpretations is the very definition of ambiguity." *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004) (quotation marks omitted).

D.

Having concluded that the statutory language is ambiguous, our final issue is whether the EPA's regulation, which accepts the unitary waters theory that transferring pollutants between navigable waters is not an "addition . . . to navigable waters," is a permissible construction of that language. *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782. In making that determination, we "need not conclude that the agency construction was . . . the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 837, 843 n.11, 104 S. Ct. at 2782 n. 11; *see also id.* at 844, 104 S. Ct. at 2782 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). Because the EPA's construction is one of

the two readings we have found is reasonable, we cannot say that it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2782.

Sometimes it is helpful to strip a legal question of the contentious policy interests attached to it and think about it in the abstract using a hypothetical. Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? On one hand, as the Friends of the Everglades might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the Water District might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other of the issue, we cannot say that either side is unreasonable.

Like the marbles rule, the Clean Water Act's language about "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), is ambiguous. The EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the language. Unless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it.

Appendix A

In the defendants' appeal, we REVERSE the district court's judgment that the operation of the S-2, S-3, and S-4 pumps without NPDES permits violates the Clean Water Act. We DISMISS AS MOOT the plaintiffs' cross-appeal from the dismissal of the Water District on Eleventh Amendment grounds.

REVERSED in part and DISMISSED in part.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JUNE 14, 2007 AND FILED JUNE 15, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 02-80309-CIV-ALTONAGA/Turnoff

FRIENDS OF THE EVERGLADES, INC., et al.,

Plaintiffs,

vs.

HENRY DEAN, Executive Director, South Florida Water Management District, in his official capacity; *et al.*,

Defendants.

FINAL JUDGMENT

THIS CAUSE came before the Court upon the Order on Remedies issued separately on this date. Pursuant to the Order on Remedies and the Court's December 11, 2006 Order Setting Forth Findings of Fact and Conclusions of Law [D.E. 636], it is

Appendix B

ORDERED AND ADJUDGED as follows:

(1) A declaratory judgment is issued in favor of Plaintiffs. In the absence of a National Pollutant Discharge Elimination System ("NPDES") permit, the South Florida Water Management District's ("SFWMD['s]") operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the Clean Water Act.

(2) A permanent injunction is issued in favor of Plaintiffs. The SFWMD's Executive Director shall apply to the Florida Department of Environmental Protection for a NPDES permit forthwith.

(3) The Court shall retain jurisdiction, including to the extent allowable in light of the parties' anticipated appeal, to ensure compliance with this Judgment. Furthermore, the Court retains jurisdiction over Plaintiffs' request for the award of attorney's fees and costs.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of June, 2007.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER ON REMEDIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JUNE 14, 2007 AND FILED JUNE 15, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 02-80309-CIV-ALTONAGA/Turnoff

FRIENDS OF THE EVERGLADES, INC., et al.,

Plaintiffs,

vs.

HENRY DEAN, Executive Director, South Florida Water Management District, in his official capacity; *et al.*,

Defendants.

ORDER ON REMEDIES

THIS CAUSE came before the Court upon the parties' memoranda on injunctive relief and remedies;[1]

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1. Plaintiffs, Friends of the Everglades ("FOE"), Fishermen Against Destruction of the Environment, Inc. ("FADE"), and Florida Wildlife Federation's ("FWF['s]") Memorandum on Injunctive Relief and Remedies [D.E. 649]; Intervenor-Plaintiff, the Miccosukee Tribe of Indians of

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Appendix C

Plaintiffs' and Plaintiff-Intervenor's Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an Involuntary Plaintiff [D.E. 653], filed on March 6, 2007; Intervenor-Defendant, U.S. Sugar's Motion to Strike Plaintiffs' Exhibits to Plaintiffs' Memorandum on Injunctive Relief and Remedies [D.E. 665], filed on April 13, 2007; and Defendant, the SFWMD's Motion for Certification Under § 1292(b) [D.E. 689], filed on June 4, 2007. The Court has carefully considered the parties' written submissions, the record, and applicable law.

I. *BACKGROUND*

On December 11, 2006, after a bench trial, the undersigned issued an Order Setting Forth Findings of Fact and Conclusions of Law (the "December 11 Order"), which concluded, in pertinent part, that "in the absence of a [National Pollution Discharge Elimination System ("NPDES")] permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing

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Florida's (the "Tribe['s]") Brief in Support of Appropriate Final Judgment Remedies and Procedures [D.E. 654]; Defendants, South Florida Water Management District (the "SFWMD") and Carol Wehle's ("Wehle['s]") Response in Opposition to Plaintiffs' Memoranda Regarding Remedies [D.E. 673]; Intervenor-Defendant, United States' Remedy Brief [D.E. 662]; Intervenor-Defendant, United States Sugar Corporation's ("U.S. Sugar['s]") Memorandum on Remedies and Post-Trial Proceedings [D.E. 664]; and the reply briefs filed by the parties.

waters from the canals in a northerly direction into Lake Okeechobee is in violation of the [Clean Water Act]." (*Dec. 11 Order* [D.E. 636] at 106). Finding that the issue had not been fully briefed, the Court did not rule, at that time, on Plaintiffs' request that the Court issue an injunction requiring the SFWMD and/or its Executive Director to obtain a NPDES permit for the SFWMD's backpumping activities. (*See id.*).

The parties have submitted lengthy briefs regarding what particular injunctive relief, if any, the Court should order. Plaintiffs and Intervenor-Plaintiff, in their briefs regarding remedies, have taken the position that the Court should enter an injunction requiring the SFWMD's Executive Director[2] to apply for a NPDES permit and should hold additional hearings to determine what interim injunctive relief should be granted while that NPDES permit application is pending.

Defendants, the SFWMD and Wehle, agree that, given the December 11 Order, the SFWMD must submit to the state's NPDES permitting scheme (although they argue an injunction is not necessary because they will voluntarily comply with that requirement). Defendants further argue that the Court should issue a final interpretive judgment and retain jurisdiction to ensure

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2. In the December 11 Order, the Court found that the SFWMD enjoyed sovereign immunity from Plaintiffs' suit. The SFWMD, however, has conceded that the case may proceed against its Executive Director under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

compliance with that judgment.[3] (*See SFWMD Remedies Br.* [D.E. 673] at 23). They also maintain that the Court does not have the authority to, nor should it, order any type of interim injunctive relief. (*See id.* at 3-23).

II. *ANALYSIS*

A. Issuance of Injunction Requiring the SFWMD to Apply for NPDES Permit

1. *Legal Standard*

A party is entitled to the issuance of a permanent injunction where the party has established: (1) the violation of a right asserted in the complaint (success on the merits in the party's case); (2) that there is no adequate remedy at law for the violation of the right; and (3) that irreparable harm will result if the court does not order injunctive relief. *See Alabama v. United States Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir.

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3. Intervenor-Defendant, United States, agrees that an order requiring the SFWMD/Wehle to apply for a NPDES permit would be appropriate in this case. (*See U.S. Remedies Br.* [D.E. 662] at 3). Intervenor-Defendant, U.S. Sugar, also appears to agree that an injunction requiring compliance with the NPDES permitting scheme would be appropriate should the Court find that, at trial, Plaintiffs met their burden of proving irreparable harm and that such an injunction would be in the public interest. (*See U.S. Sugar Remedies Br.* [D.E. 664] at 46-47). U.S. Sugar has also taken the position that the issuance of interim injunctive relief would be inappropriate in this case. (*See id.* at 3).

2005). Because issuance of an injunction is an equitable remedy, the Court must also balance the hardships between the parties and give due regard to the public interest in fashioning an appropriate remedy. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

2. *Issuance of Injunction is Warranted Here*

As more fully set forth in the Court's December 11 Order,[4] Plaintiffs have established a violation of the CWA, prevailing on the merits of their claim. Such a violation of the CWA may only be remedied by the issuance of equitable relief, and the Court finds that there is no adequate remedy at law. The outstanding questions, then, are whether: (1) Plaintiffs established at trial the existence of irreparable harm, and (2) the balance of hardships and the public interest favor the issuance of an injunction requiring that the SFWMD's Executive Director apply for a NPDES permit.

a. *Irreparable Harm*

Plaintiffs contend that they established at trial that irreparable harm will result if their requested relief is not granted. In support of this argument, they cite to the testimony of Dr. Tom Crisman, who testified that the backpumping at issue creates a significant risk of triggering a toxic algal bloom that could cause serious injury to humans and death to wildlife. (*See Pls.*

4. The Court adopts in this Order the Findings of Fact and Conclusions of Law set forth in the December 11 Order.

Remedies Brief [*D.E.* 649] at 4-5). In addition, Plaintiffs contend that the trial testimony established that backpumping and disinfection create toxic disinfection byproducts that can sicken humans. (*See id.* at 5). Finally, Plaintiffs contend that the trial testimony established that backpumping causes irreparable ecological harm to Lake Okeechobee. (*See id.* at 6). Defendants do not seriously challenge these assertions, and the undersigned finds that Plaintiffs have met their burden of showing the potential for irreparable harm in the absence of a permanent injunction.

b. *Balance of Equities and Public Interest*

Plaintiffs contend that the irreparable harm they illustrated at trial outweighs any inconvenience to Defendants that will result from the issuance of an injunction requiring a NPDES permit. (*See id.* at 6). They also assert that the public interest in safe water supplies and the ecological integrity of Lake Okeechobee favor the issuance of such an injunction. (*See id.*). The undersigned agrees and finds that equitable considerations favor the issuance of an injunction requiring that the SFWMD's Executive Director apply for a NPDES permit.[5]

5. The SFWMD and Wehle assert that the issuance of an injunction is unnecessary because the December 11 Order made clear that the SFWMD must have a NPDES permit for its backpumping operations, an issue that was previously unclear, and the SFWMD has every intention of complying with the law

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3. *Inclusion of Deadlines in Injunction*

Plaintiffs contend that the Court should place a specific time limit for compliance and for the issuance of the permit. Given anticipated complications in the permitting process, including, among other things, that there are no "off-the-shelf" templates that can be followed in fashioning an appropriate permit, the Court finds that the imposition of hard deadlines for issuance of the NPDES permit would be inappropriate in this case, and that an order requiring application for such a permit "forthwith" will adequately address Plaintiffs' claims.

B. Issuance of Interim Injunctive Relief

In their Remedies Brief, Plaintiffs assert that the Court should hold hearings regarding whether to order interim relief, which could include, *inter alia*, requiring: (1) the SFWMD and/or its Executive Director to report to the Court on backpumping episodes; (2) development of a new pumping protocol; (3) preparation of an analysis of the effect of the Bolles Canal expansion; (4) construction of additional in-city and on-farm on-site

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as interpreted by the Court. (*See SFWMD Remedies Br.* at 24-25). Having found that Plaintiffs are legally entitled to the issuance of an injunction, the remedy they sought in their complaints, the undersigned is not persuaded now by the argument that the Court should not enter an injunction because the SFWMD's Executive Director will voluntarily comply with the implications of the Court's interpretation of the CWA.

floodwater storage facilities; (5) application of the SFWMD's best management practices ("BMP") rule in the S-4 Basin; and (6) stormwater treatment area ("STA") construction or enlargement. (*See Pls. Remedies Br.* at 9-10). Intervenor-Plaintiff, the Tribe, additionally requests that the Court issue an order invalidating the Environmental Protection Agency's Proposed Rule regarding NPDES water transfers, *see* 71 Fed. Reg. 32887, a request the United States adamantly opposes on a number of bases. (*See Tribe Remedies Br.* [D.E. 654] at 16-19; *U.S. Remedies Br.* at 7-11).

Plaintiffs propose an extensive and lengthy process for the Court's consideration of these proposed interim remedies. That process would include the designation of experts, exchange of expert reports and rebuttal expert reports, mediation wherein the parties' experts would attempt to agree on appropriate interim relief, expert depositions, and an evidentiary hearing.

Defendants raise a number of challenges to Plaintiffs' requests for interim relief, including that Plaintiffs failed to put Defendants on notice of these requests in their complaints and failed to establish their entitlement to such interim relief at trial. Defendants also raise a number of legal arguments regarding the Court's authority to issue such interim relief. In addition, based on Plaintiffs' proposal for a lengthy remedies procedure, the SFWMD has renewed its Motion for Certification Under § 1292, urging that the Court enter a final declaratory judgment and allow the parties to take an interlocutory appeal of the December 11 Order.

Appendix C

The undersigned finds that the issuance of interim relief is premature, and perhaps academic at this time. By entering a Final Judgment that includes the permanent injunction that Plaintiffs sought from the inception of this case, the Court has resolved the case in a manner that allows the parties to immediately pursue their appeals of the Court's conclusion that the CWA requires the SFWMD to acquire a NPDES permit for its backpumping activities. That appeal would likely result in a stay of any interim relief the Court could order at the conclusion of the somewhat lengthy process Plaintiffs envision. Conducting further evidentiary hearings, which would require the parties to engage in additional discovery and would require the Court to resolve highly technical arguments regarding the environmental impact of the SFWMD's activities, could potentially result in the unnecessary expenditure of resources for both the judiciary and the parties. Should the Court's interpretation of the CWA be overturned on appeal, that expenditure of time and resources would have been in vain.

In entering a Final Judgment, the Court will retain jurisdiction to ensure compliance with the judgment, meaning that the Court will have jurisdiction to order interim remedies should this matter return to this Court following appeal. Plaintiffs' present requests for interim relief are therefore denied.

Appendix C

C. Joinder of DEP Secretary Mike Sole

In their Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an InvoluntaryPlaintiff [D.E. 653], Plaintiffs and Intervenor-Plaintiff contend that the Court should join Mike Sole (the "DEP Secretary") as an involuntary plaintiff for purposes of the remedies phase of the proceedings to "ensur[e] that the defendant's NPDES permit applications . . . are promptly processed and issued and to facilitate consideration of the permitting agency's position on questions relating to interim remedies." (*Mot.* [D.E. 653] at 1-2).

Setting aside the issues of whether such a joinder would be feasible under the Federal Rules of Civil Procedure, the undersigned agrees with Defendants and Intervenor-Defendant, United States, that such joinder would be premature at this time because there is no evidence that the DEP Secretary or the Florida Department of Environmental Protection will attempt to delay issuance of a permit to the SFWMD. Should such a delay occur or should another reason for joinder arise, Plaintiffs may renew their motion.

D. Dismissal of the SFWMD

In their brief regarding remedies, the SFWMD and Wehle request that the SFWMD be dismissed from this action on the basis of the sovereign immunity that the undersigned found it enjoys from this suit. The request is appropriate and is granted.

Appendix C

III. *CONCLUSION*

Based on the foregoing, it is

ORDERED AND ADJUDGED as follows:

(1) Plaintiffs' request that the Court issue an injunction requiring the SFWMD's Executive Director to apply for a NPDES permit forthwith is **GRANTED**. The injunction shall be issued in a separate Final Judgment, which shall be immediately appealable. The Court will retain jurisdiction over the parties, including to the extent allowable while any appeal is pending, to ensure compliance with the judgment.

(2) Plaintiffs' request for interim injunctive relief is **DENIED** for the reasons set forth above.

(3) Plaintiffs and Plaintiff-Intervenor's Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an Involuntary Plaintiff **[D.E. 653]** is **DENIED**.

(4) U.S. Sugar's Motion to Strike Plaintiffs' Exhibits to Plaintiffs' Memorandum on Injunctive Relief and Remedies **[D.E. 665]** is **DENIED AS MOOT**.

(5) The SFWMD's Motion for Certification Under § 1292(b) **[D.E. 689]** is **DENIED AS MOOT**.

(6) Defendants' Motion to Strike and, in the Alternative, Response to Requests to Clarify and Reconsider Eleventh Amendment Issues [**D.E. 691**], filed on June 14, 2007, is **DENIED**.

(7) Plaintiffs' claims against Defendant, the SFWMD, are **DISMISSED**. The Executive Director of the SFWMD shall remain as a party to this action.

(8) The Clerk of the Court is instructed to **CLOSE** the case. Any pending motions not otherwise ruled upon are **DENIED AS MOOT.**

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of June, 2007.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED AND FILED DECEMBER 11, 2006, SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 02-80309-CIV-ALTONAGA/Turnoff

FRIENDS OF THE EVERGLADES, INC., *et al.*,

Plaintiffs,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Defendants.

ORDER SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court for a non-jury trial beginning on January 9, 2006 and ending on April 19, 2006. The Court heard testimony from over 20 witnesses, and approximately 165 exhibits were entered into evidence.

Appendix D

I. BACKGROUND

Plaintiffs, Friends of the Everglades ("FOE") and Fishermen Against Destruction of the Environment ("FADE"), filed suit against the South Florida Water Management District ("SFWMD") on April 8, 2002. FOE, an organization of over 6,000 members, was formed by Marjory Stoneman Douglas to preserve and protect the Everglades. (*Comp.* [D.E.1] at 2). FADE was founded by a group of fishermen and conscientious conservationists concerned about the degradation of Lake Okeechobee. (*See id.* at 3). The SFWMD is an independent, special district of the State of Florida charged with the operation and maintenance of certain pump stations that pump water into Lake Okeechobee. (*See id.* at 4).

The Complaint sought an order requiring the SFWMD to obtain a National Pollution Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, before the SFWMD could discharge water containing pollutants into Lake Okeechobeeby means of the S-2, S-3, and S-4 pump stations. Jurisdiction was based on the "citizen suits" provision of the CWA, 33 U.S.C. § 1365(a),[1] and

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1. Section 1365(a) provides, in part, that

> any citizen may commence a civil action on his own behalf —
>
> (1) against any person (including (i) the United States, and (ii) any other governmental

(Cont'd)

federal question jurisdiction under 28 U.S.C. § 1331. The case was consolidated with *Florida Wildlife Federation v. So. Florida Water Mgmt. Dist.*, Case No. 02-80918-Civ (*see Dec. 9, 2002 Order* [D.E. 39]), and the latter case was accordingly closed. The Florida Wildlife Federation ("FWF") is a statewide non-profit conservation and education organization with a mission of preserving, managing, and improving the water resources and fish and wildlife habitat of Florida. (*Comp.* [D.E. 1 in 02-80918-Civ] at 3).

The City of South Bay, Florida, and United States Sugar Corporation ("U.S. Sugar") were granted permission to intervene as Defendants in an order dated October 2, 2002. [D.E. 23].[2] In support of intervention,

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(Cont'd)

> instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, . . . to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

2. The undersigned subsequently granted the City of South Bay, Florida's Motion to Withdraw. [D.E. 212].

U.S. Sugar asserted that it has substantial sugar cane growing and harvesting operations in the S-2 and S-3 drainage basins served by the pump stations at issue, that it has property interests in the crops, that operation of the pump stations prevents its crops from being flooded and destroyed, that issuance of the requested NPDES permits for previously unregulated structures could cause U.S. Sugar to lose a statutory entitlement for an agricultural exemption from NPDES permitting, and that, in short, any decision requiring the SFWMD to obtain a NPDES permit would be devastating for U.S. Sugar's operations. (*See Mem. in Supp. of Mot. to Intervene* [D.E. 18] at 2-3).

The Miccosukee Tribe of Indians of Florida ("Miccosukee") was granted leave to intervene as a Plaintiff in an order dated December 9, 2002. [D.E. 40]. In support of intervention, Miccosukee maintained that backpumping of pollutant-laden waters by the SFWMD into Lake Okeechobee threatened Miccosukee's way of life in the Everglades and Lake Okeechobee, and that the destruction infringed on Miccosukee's ability to practice its religion and on its traditional bases of subsistence, commercial activities, and natural resources. (*Mot. to Intervene* [D.E. 24] at 4).

Much later, on May 2, 2005, the United States of America, on behalf of the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA"), was granted permission to intervene as a Defendant. [D.E. 263]. The United States maintained it had a compelling interest

in the litigation because for decades the Corps had been building a comprehensive network of levees, water storage areas, pumps and canal improvements in South Florida, and the S-2, S-3, and S-4 pump stations were part of the Central and South Florida Project. As for the EPA, that agency administers the NPDES permitting program in conjunction with the states, including Florida, that have assumed responsibility for issuing permits within their borders under 33 U.S.C. § 1342. (*See* [D.E. 198] at 1-2).

On May 12, 2003, the case was reassigned to the docket of the undersigned. [D.E. 77]. After the Supreme Court accepted certiorari in yet another related case styled *So. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, Case No. 98-6056-Civ (*"S-9 Case"*), all proceedings were stayed by order dated July 1, 2003. [D.E. 147]. On January 21, 2005, after the Supreme Court entered its decision in the *S-9 Case*,[3] the Court granted the SFWMD's Motion to Reopen the Case. [D.E. 179].

The pleadings have been amended several times by all parties since the inception of the litigation. Miccosukee's Second Amended Complaint, filed on February 22, 2005, among other things, added as a named Defendant Henry Dean, Executive Director of the SFWMD, in his official capacity. [D.E. 188].

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3. *See So. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

Appendix D

Plaintiffs seek the following relief: (1) a judgment declaring that the SFWMD (and its representatives) has violated, and is in continuing violation of, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; (2) an order enjoining the SFWMD from continuing to violate the CWA; (3) an injunction requiring the SFWMD (and its representatives) to obtain a NPDES permit for its backpumping activities at the S-2, S-3, and S-4 pump stations; (4) an order requiring the SFWMD to provide Plaintiffs with a copy of all reports it submits to the state or federal government concerning the discharge of water to Lake Okeechobee (the "Lake");[4] and (5) an award of attorney's fees and costs. No affirmative relief is sought against Intervenor-Defendants, U.S. Sugar. An issue raised by the SFWMD consistently in its pleadings is its defense of sovereign immunity.

The undersigned denied the parties' cross-motions for summary judgment in an order dated November 23, 2005 [D.E. 527], and the trial followed. During and after the trial, the undersigned reviewed the evidence admitted, and considered all applicable law and arguments presented by counsel. The following findings of fact and conclusions of law are therefore made pursuant to the requirements of Rule 52 of the Federal Rules of Civil Procedure.

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4. FWF has not specifically requested the furnishing of such reports.

Appendix D

II. FINDINGS OF FACT

A. Historical Description of Lake Okeechobee and the Everglades

The landscape of South Florida today is markedly different from that which existed prior to the extensive settlement and development the area has experienced since the late 19th century. The Court's analysis begins with a description of the area as it existed prior to development efforts. The description focuses primarily upon the southern portion of Lake Okeechobee and the northern portion of the Everglades. Today this combined area is known as the Everglades Agricultural Area ("EAA").

Lake Okeechobee has been referred to at various times throughout recorded history as Laguna Del Espiritu Santo (1763), Lak du St. Esprit (1780), Lake Mayacoo (1835), and Lake O-Kee-Cho-Bee(1839, 1856). (*See Trial Tr. Feb. 14*, 58:22-59:8, 60:17-20, 63:6-18, 65:3-66:14). To the south of Lake Okeechobee (in the area now known as the EAA and, further south, the Everglades) was an immense and vast wetland referred to by Native Americans as "grassy water." (*See Joint Pretrial Stip.* [D.E. 536], Attach. 5B ¶ 6). The "grassy water" area encompassed some three million acres. (*See id.*). Today, the Everglades is less than half of its pre-drainage size. (*See id.*, ¶ 48). Prior to extensive drainage operations, Lake Okeechobee had higher

water levels and extended further south and west than it does today. (*Id.*, ¶ 39).[5]

Maps, surveys, and accounts of the natural conditions of the southern rim of the Lake describe a sandy-bottomed lake with water grasses growing in the shallows. (*Plain. Ex. 60*, p. 66; *Plain. Ex. 57*). The Lake bed rose to a muck rim covered with custard apple trees, (*Trial Tr. Jan. 9, 2006*, 163:21-25, 165:10-24), followed by a slow downward gradient to the south through the Everglades. (*Trial Tr. Jan. 9, 2006*, 189:8-18). Short tributary rivers flowed from the Lake's southern forested rim. (*Plain. Ex. 60*, pp. 69-73). Accounts survive of parties navigating the tributary rivers extending from the southern shore of the Lake. (*See Trial Tr. Feb. 14, 2006*, 68:21-69:5; *Plain. Ex. 60*).

Lake Okeechobee appears as a dominant feature on maps of Florida dating back at least 250 years. (*Trial Tr. Feb. 14, 2006*, 58:22-25; *see also Def. Ex. 75*, p. 6). Beginning in the eighteenth century, there were various attempts to map the area of South Florida. Although many features of the maps changed over time as map-making techniques and knowledge of the area improved, the maps consistently showed two separate features — a very large lake bordered on the south by a vast

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5. The surface waters of the Lake historically encompassed the area that today contains the Herbert Hoover Dike, which presently surrounds the Lake, and the S-2, S-3, and S-4 pump stations, the stations at issue in this litigation. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 35; *Trial Tr. Jan. 9, 2006*, 191:13-18, 211:12-20; *Trial Tr. Jan. 18, 2006*, 104:11-18).

wetland. (*See Trial Tr. Jan. 9, 2006*, 157:10-168:21; *Trial Tr. Feb 14, 2006*, 58:12-66:11; *Plain. Exs. 16A, 16B, 220*). In other words, all recorded maps show some boundary between Lake Okeechobee and the area currently known as the EAA. (*See id.*).

The southern shoreline of the Lake was surveyed by J. M. Kreamer in 1892 (*Plain. Ex. 220*), and by John W. Newman in 1910. (*Def. Ex. 16D*). It was officially surveyed by the State of Florida from 1914-17 (the "F. C. Elliot Survey"). (*Plain. Ex. 55*). The conclusions of the F.C. Elliot Survey are referenced in a case that required the court to determine the historical boundary between the Lake and the marshlands to the south of the Lake. (*See Plain Ex. 57*). On a related note, an account written in the newspaper *New Orleans Democrat* in 1870 references an exploring party making camp on the southern shore of Lake Okeechobee, further suggesting that the Lake, at least at times, had a distinguishable southern shoreline. (*Plain. Ex. 60*, p. 70).

Finally, photographs of the Lake Okeechobee shoreline taken from the cupola of the Bolles Hotel in April 1912 were entered into evidence.[6] (*Plain. Exs. 16E1, 16E2, 16E3*). These photographs depict a custard apple forest along a dry southern shoreline. (*See Trial Tr. Jan. 9, 2006*, 170:16-174:14; *Plain. Exs. 16E1, 16E2, 16E3*).

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6. The Bolles Hotel was located on the southern shore of Lake Okeechobee on the western bank of the Rita River. (*See Trial Tr. Jan. 9, 2006*, 167:24-169:12). Its location is shown on the Newman Survey of 1910. (*See Plain. Ex. 16D*). It was constructed by Richard Bolles, an early Everglades land speculator. (*Trial Tr. Jan. 9, 2006*, 169:8-12).

Notwithstanding these early maps, accounts and photographs, the shoreline was not as well-defined as Plaintiffs contend. Lieutenant J.C. Ives, for example, described the Lake as covering nearly 1,200 square miles, nearly double the current size of the Lake. (*See Def. Ex. 206*, p. 38). Moreover, he observed that "[f]rom Cypress Point around toward the south and south-west, the shore is much less clearly defined. The Everglades form the general boundary, but no distinct line marks the division between this region and the surface of the lake; the southern portion of the latter being much grown up with grass [sic]." (*Id.*).[7] Similarly, a report of the Board of Commissioners of the Okeechobee Flood Control District noted that historically "the south shore of the Lake was not clearly defined being low, irregular and swampy." (*Def. Ex. 213*, p. 12).

Moreover, there was evidence adduced at trial that the 1912 Bolles Hotel photograph, the most convincing evidence of a well-defined southern shoreline, was taken during the annual dry season, when the Lake typically contracts. (*See Trial Tr. Feb. 10, 2006*, 90:4-7). Additional evidence suggests that the area was experiencing a drought during the period in question. (*See id.*, 90:8-12, 91:7-10). Finally, the photographs were taken after 20 years of drainage operations and thus do not provide a truly accurate depiction of the Lake and the EAA in

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7. Ives' memoir acknowledges that the short time in which the map was compiled "precluded anything like a thorough investigation as to what is now known in the region in question." (*Def. Ex. 206*, p. 6).

their natural states. (*See id.*, 89:21-25; *Trial Tr. Feb. 13, 2006*, 17:20-23).

That the historical accounts of the southern shoreline are inconsistent is not surprising. The size of Lake Okeechobee varied significantly depending upon meteorological conditions within its watershed. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 38; *Trial Tr. Jan. 13, 2006*, 52:18-23; *Trial Tr. Jan. 18, 2006*, 104:3-5; *Trial Tr. Jan. 19, 2006*, 16:20-23; *Def. Ex. 206*, pp. 6-7). The characteristics of the Lake and the Everglades varied seasonally, decadally and otherwise, through extreme cycles of flooding and drought. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 38; *Def. Ex. 206*, p. 7). Even today, Lake Okeechobee periodically recedes within the boundary established by the Herbert Hoover Dike ("Dike"), which extends around the rim of the Lake. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 40; *Trial Tr. Feb. 14, 2006*, 78:1-24).

The undersigned concludes that, historically, observable distinctions existed between Lake Okeechobee and the vast wetlands to the south of the Lake. A contrary conclusion would fly in the face of the evidence presented. However, the precise point or points dividing the Lake's surface waters from the wetlands to the south varied drastically depending upon numerous conditions, explaining, at least in part, the inconsistent accounts of the area that have survived.

Appendix D

B. Development of the Everglades

1. *Early Development*

Beginning in the mid 1800s, the State of Florida embarked upon legislative efforts to encourage development of the Everglades ecosystem, focusing its efforts on draining the area to increase its marketability and habitability. (*See Trial Tr. Jan. 13, 2006*, 57:9-13; *Trial Tr. Feb. 8, 2006*, 204:11-16). Land reclamation was the single-minded purpose behind the efforts. (*See Trial Tr. Feb. 10, 2006*, 94:17-95:4, 95:20-23).

To further the drainage activities, canals were constructed connecting the Lake to the Gulf of Mexico. (*Joint Pretrial Stip.*, Attach. 5B ¶ 10).[8] The overarching goal of the canal construction was to move water from Lake Okeechobee to tidal waters. (*See id.*). The theory was that if Lake Okeechobee could be drained, then the Everglades would eventually dry out. (*See Joint Pretrial Stip.*, Attach. 5B ¶¶ 9, 10; *Def. Ex. 203*, pp. 56, 65).

By 1912, construction had begun on three major canals, the North New River, Hillsboro, and Miami Canals. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 10). The

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8. Two canals were constructed in the 1880s. One canal, named the 3 Mile Canal, connected Lake Okeechobee to Lake Hickpochee. (*Trial Tr. Feb. 13, 2006*, 16:20-23). The other canal, located in the area of the present Miami Canal, extended approximately nine to ten miles into the Everglades from the Lake. (*Id.*, 16:24-17:1).

canals were connected to the Atlantic Ocean by April 1917. (*See Trial Tr. Jan. 18, 2006*, 107:3-5). The purposes of constructing the canals were to lower the elevation of the Lake, drain the rich muck soils south and east of the Lake, and to foster navigation. (*See Joint Pretrial Stip.*, Attach. 5A ¶¶ 10, 19). To further the effort, the Everglades Drainage District (established in 1913) constructed hundreds of miles of small drainage canals throughout the Everglades. (*See id.*, Attach. 5B ¶¶ 10, 12).

The early private and public drainage canals were incapable of controlling flooding. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 13). Problems with flooding reached an apex in 1926 and 1928, when hurricanes killed over 2,500 people living in towns just south of Lake Okeechobee. (*See id.; Trial Tr. Feb. 10, 2006*, 95:12-15; *Def. Ex. 213*, p. 7; *Def. Ex. 203*, pp. 8-9). Congress responded to the hurricanes of the 1920s by authorizing construction of the Dike. (*See Trial Tr. Feb. 8, 2006*, 204:21-23). The initial authorization contemplated building a substantial dike system on the southern shore of Lake Okeechobee and a smaller dike system on the northern shore of the Lake. (*See id.*, 204:23-205:1). By 1937, construction along the southern shore was substantially completed. (*See id.*, 205:2-5).

The Dike, however, proved incapable of adequately controlling flooding. Hurricanes in the 1940s caused Lake waters to overflow the newly constructed Dike, flooding the surrounding areas and severely damaging the Dike in the process. (*See Trial Tr. Jan. 13, 2006*,

59:12-19; *Trial Tr. Feb. 8, 2006*, 205:6-10). In 1947 and 1948, ninety percent of southeastern Florida, from Orlando to the Keys, was flooded. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 13). Indeed, after the 1947 hurricane, there were reports of many Florida residents being forced to live on the second floors of their homes for up to nine months. (*Trial Tr. Jan. 13, 2006*, 59:15-16).

In addition to the flooding problems, the drainage of Lake Okeechobee and the Everglades produced other unintended consequences. When the areas surrounding Lake Okeechobee were drained, the soils dried out and thousands of acres of land were destroyed by fires. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 14). The fires caused loss of soil material that had taken hundreds or thousands of years to accrete. (*Trial Tr. Jan. 19, 2006*, 169:5-7). Fires dirtied the air to such an extent that health warnings were issued in Dade County.[9] (*Trial Tr. Feb. 10, 2006*, 112:13-15).

Uncontrolled drainage caused additional problems through the lowering of the water table. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 11). The lowered water table allowed the ocean saltwater to intrude in areas where fresh water had previously been. (*See id.*; *Trial Tr. Jan. 20, 2006*, 96:16-97:5). Saltwater intrusion contributed to the destruction of well fields and lands along the east coast of Florida. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 11).

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9. Dade County has since been renamed Miami-Dade County.

2. *C&SF Project*

In the 1930s, the State developed a comprehensive plan for flood control and water supply, known as the "re-watering plan." The plan dedicated the northern portion of the Everglades (what has become known as the EAA) for reclamation, and dedicated the southern portion of the Everglades (what have become the Water Conservation Areas) for water supply and storage to protect and provide water supply to the lower east coast of Florida, from West Palm Beach to Homestead. (*See Trial Tr. Jan. 20, 2006*, 114:13-115:18). As concerns arose over the health of the Everglades and the inability of the "re-watering plan" to address the problems, the Central and South Florida Project for Flood Control and Other Purposes ("C&SF Project" or the "Project") was adopted. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 37). Congress authorized the C&SF Project in 1948.[10] (*See id.*, Attach. 5B ¶ 15; *Trial Tr. Jan. 13, 2006*, 60:2-3, 14-16; *Trial Tr. Jan. 18, 2006*, 80:17-19; *Def. Exs. 1, 205*).

The C&SF Project is a multi-purpose project that provides flood control; water supply for municipal, industrial, and agricultural uses; water supply for the Everglades National Park; protection from saltwater intrusion; and protection of fish and wildlife resources.[11]

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10. For a variety of reasons, several components of the C&SF Project that were originally planned have not been constructed. (*See Trial Tr. Jan. 20, 2006*, 101:1-9).

11. Congress stated the purposes of the C&SF Project, in relevant part, as follows:

(Cont'd)

Appendix D

(*See Joint Pretrial Stip.*, Attach. 5B ¶ 17; *Trial Tr. Jan. 13, 2006*, 149:23-150:23; *Trial Tr. Jan. 18, 2006*, 80:10-15; *Def. Ex. 232*, p. i; *Def. Ex. 205*, pp. 2-3, 50). Waste disposal is not one of the designated purposes of the C&SF Project. (*See Trial Tr. Jan. 13, 2006*, 150:24-153:3; *Trial Tr. Jan. 20, 2006*, 118:20-25)).[12]

The C&SF Project covers an area of approximately 12,000 square miles. (*See Trial Tr. Jan. 18, 2006*, 80:6-7). Water is managed through the use of water control

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(Cont'd)

> *Construction program.* The comprehensive plan is a long-range plan for the control and use of water resources of most of central and southern Florida.
>
> * * *
>
> The flood problems of central and southern Florida are closely interrelated with the development of water and land resources of the entire area; this report therefore considers all related problems of water control and use.
>
> * * *
>
> A long-range plan of this kind for flood protection and water quality is urgently needed now, so that development of the region can proceed in an orderly manner which will preserve its resources of water and land for future generations.

(*Def. Ex. 205*, pp. 14, 45, 58).

12. The water moved through C&SF structures, however, contains waste products. (*See Trial Tr. Jan. 13, 2006*, 162:16-163:12).

structures including the Dike, levees, canals, spillways, culverts, pump stations and other water diversion facilities. (*Joint Pretrial Stip.*, Attach. 5B ¶ 20).[13] These water control structures were designed and developed along general watershed basin concepts. (*Trial Tr. Jan. 25, 2006*, 23:10-14). The C&SF Project is responsible for moving billions of gallons of water daily. (*Joint Pretrial Stip.*, Attach. 5B ¶ 24).

The SFWMD pump stations are flow diversion facilities, the purpose of which is to change the movement, flow and circulation of waters. (*Trial Tr. Jan. 20, 2006*, 110:12-22). As the local sponsor for the C&SF Project, the SFWMD is responsible for operating and maintaining most of the Project's structures, including the S-2, S-3, and S-4 pump stations at issue in this case. (*Trial Tr. Jan. 19, 2006*, 78:14-19). However, in operating the structures, there is a tremendous amount of coordination between the Corps and the SFWMD. (*See Trial Tr. Jan. 18, 2006*, 85:5-11).[14]

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13. The system is comprised of over 1,000 miles of canals, over 1,000 miles of levees, approximately 150 structures and 15-30 major pump stations. (*See Trial Tr. Jan. 13, 2006*, 61:16-19).

14. The Corps developed the water control plan for the operation of the C&SF system. The water control plan contains information governing the regulation of the lakes and reservoirs in the system and contains operating criteria for the structures and canals within the system. (*See Trial Tr. Jan. 18, 2006*, 83:1-84:1; *see also Def. Exs. 215-18*).

Appendix D

The C&SF Project has successfully reclaimed much of the land in South Florida. (*Joint Pretrial Stip.*, Attach. 5B ¶ 25). Today, millions of people live within the flood plain of the Everglades ecosystem,[15] which would not be possible without the flood protection and stable water supply provided by the C&SF Project. (*Id.*).

C. Current Description of Lake Okeechobee and the Surrounding Areas

1. *Lake Okeechobee*

The efforts to develop South Florida had a profound effect on the Lake and the Everglades. The present ecosystem scarcely resembles the natural system.

Lake Okeechobee, a large shallow lake, remains the central feature of the Everglades ecosystem and is recognized as its liquid heart. (*Joint Pretrial Stip.*, Attach. 5B ¶ 30). The Lake is a key component of the South Florida Kissimmee-Okeechobee-Everglades surface water hydrologic and ecological system. (*See id.*, Attach. 5A ¶ 63). The system begins in Central Florida near Orlando, extends southward through the Kissimmee Chain of Lakes, the Kissimmee River, and Lake Okeechobee, and continues southward through the Everglades into Florida Bay. (*Id.*, Attach. 5A ¶ 63). The ecosystem is an immense, integrated system of

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15. Indeed, in the early 20th century, vast amounts of what is now downtown Miami remained under several feet of water. (*Trial Tr. Jan. 19, 2006*, 184:5-21).

connected surface and ground waters that covers over 15,000 square miles. (*Id.*, Attach. 5B ¶ 5).

Lake Okeechobee spans an area of approximately 730 square miles and has an average lake-wide depth of nine feet. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 40; *Trial Tr. Jan. 18, 2006*, 103:23-24; *Plain Ex. 20*, p. 2). It is the largest body of fresh water in the southeastern United States and the second largest freshwater lake within the continental United States. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 30). The parties have stipulated that the Lake is a navigable water (*see id.*, Attach. 5A ¶ 5), as that term is defined in the CWA and its regulations. *See* 33 U.S.C. § 1362(7); 40 C.F.R. § 230.3(s); 33 C.F.R. § 328.3(a).

Lake Okeechobee is divided into six regions. The "pelagic" region is characterized by open water and a muddy or sandy bottom. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 44). Two near-shore regions (north and south), contain a high density of submerged plants when water levels in the Lake are low and periodic algal blooms when water levels are high. (*Id.*). Three littoral regions,[16] located in the northern and southern portions of the Lake and at Fisheating Bay, contain their own unique vegetation structures and water quality. (*Id.*). Significant chemical, physical and biological differences

16. A littoral region is defined as an area in which the bottom of a lake is covered by macrophytes (plants that are visible). (*See Trial Tr. Jan. 9, 2006*, 83:13-25).

exist between each Lake region and even within each region. (*See id.*, ¶ 46).

The Lake has several hydrological and ecological functions. It functions as a reservoir to collect and supply water to the urban, agricultural and natural systems throughout the southern Florida peninsula. It provides flood protection while serving as a multimillion dollar sport and commercial fishery. It also provides a habitat for wading birds, migratory waterfowl, and the federally endangered Everglades Snail Kite. (*Joint Pretrial Stip.*, Attach. 5B ¶ 33).

As noted, Lake Okeechobee functions, in part, as a reservoir. The goal of any reservoir "is to store excess water from times when you don't need it and to release it during periods when you do." (*Trial Tr. Jan. 20, 2006*, 73:22-24). In order to carry out its storage functions, the water level of the Lake is generally brought to its lowest point at the end of May, creating excess storage capacity that may be utilized for flood control purposes during the rainy season. (*See id.*, 72:14-73:2). The water levels in the Lake are permitted to rise during the rainy season and the excess water is made available to different users for a variety of purposes. (*See id.*, 72:23-73:2). Beyond using the waters for agricultural and/or municipal purposes, the ability to store and later release the water is critical to avoiding saltwater incursions onto the land. (*See id.*, 97:6-24).

Virtually the entire Lake is enclosed by the Dike, a 27 to 42-foot high, and up to 300-foot wide barrier that

physically separates the Lake from the lands surrounding the Lake. (*Trial Tr. Jan. 13, 2006*, 75:1-2; *Trial Tr. Feb. 9, 2006*, 21:9-24). A portion of the Dike was built within the shoreline of the historical Lake. (*Trial Tr. Jan. 18, 2006*, 103:21-23; *see also Trial Tr. Jan. 10, 2006*, 142:1-6). The Dike is made of a soil matrix.[17] (*See Joint Pretrial Stip.*, Attach. 5B ¶¶ 33, 34; *Trial Tr. Feb. 8, 2006*, 206:5-7, 207:21-25). It prevents the Lake from expanding and contracting as it would under natural conditions. (*See Trial Tr. Jan. 25, 2006*, 46:14-17). The Dike serves as a dual functioning dam, providing water storage in Lake Okeechobee and protecting the surrounding communities from flooding. (*Joint Pretrial Stip.*, Attach. 5B ¶ 34).

A rim canal surrounds the southern inner edge of Lake Okeechobee. (*Trial Tr. Jan. 9, 2006*, 120:12-16). In most places, the rim canal is directly adjacent to the Dike. (*Trial Tr. Jan. 10, 2006*, 82:14-15). The rim canal was dug out to provide material for construction of the Dike. (*Trial Tr. Jan. 9, 2006*, 120:17-19). The S-2 and S-3 pump stations pump water directly from the canals into the rim canal. (*Trial Tr. Jan. 10, 2006*, 82:16-17).

A series of canals[18] have been constructed that intersect the Dike at the southern end of the Lake. The

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17. The Dike consists of a number of materials, including sands, shells, limestone, limestone fragments, silts, and peat. (*Trial Tr. Feb. 8, 2006*, 207:21-25). Most of the materials of which the Dike is composed were hydraulically dredged from the area. (*Id.*, 206:6-11).

18. The parties have stipulated that the EAA canals are navigable waters. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 11).

largest canals, the North New River, Hillsboro and Miami Canals, extend through several basins, from the southern side of Lake Okeechobee through the EAA, the Water Conservation Areas, the lower east coast communities or the remnant Everglades, and ultimately to the bays and ocean. (*Joint Pretrial Stip.*, Attach. 5B ¶ 22; *Def. Ex. 1*). Smaller canals manage more local waters. The C-20 Canal, for example, is used to manage the waters of the S-4 basin, a basin that includes the City of Clewiston and the surrounding agricultural lands. (*Id.*, ¶ 23).

In all, there are approximately 43 structures that intersect the Dike, allowing water to flow into and/or out of the Lake. (*See Trial Tr. Jan. 18, 2006*, 92:7-9). There are 19 points that allow outflow from the Lake (five represent primary outflow points and 14 also allow inflow). (*See id.*, 92:20-93:1, 93:2-6). Fisheating Creek is the only uncontrolled inflow source to the Lake. (*See id.*, 93:11-18). The Lake has no uncontrolled outflow points. (*See id.*, 93:25-94:1). It is beyond dispute that the natural storage capacity of the Lake basin has been lost as a result of the man-made modifications to the system. (*See Trial Tr. Jan. 26, 2006*, 20:2-4, 22:3-16).

2. *The EAA*

Parts of Lake Okeechobee's original lakebed — separated from the Lake by the Dike — and portions of the northern Everglades marshes, were designated by the C&SF Project as the EAA, which was to be reclaimed for public and private land uses. (*Joint Pretrial Stip.*,

Attach. 5B ¶ 36). The EAA comprises 630,000 acres between the southern boundary of the Dike and the northern boundaries of the Water Conservation Areas. (*See id.*, ¶ 37). The EAA is a highly productive agricultural region extending from the south shore of Lake Okeechobee to the northern levees of the conservation areas (of the Everglades). The Lake supplies irrigation water to the EAA. (*Joint Pretrial Stip.*, Attach. 5A ¶ 43). The EAA communities and land uses were, and are, fully dependent upon the Lake for their water supply and flood control. (*See id.*, ¶¶ 43, 53).

Muck soils predominate in the EAA. Prior to drainage operations, materials were deposited in the waters; those materials were, in turn, absorbed by the soil. (*See Trial Tr. Jan. 9, 2006*, 45:11-16).

> The soils of the Everglades were formed under wetland conditions. The water that covered the soil surface much of the year greatly reduced oxygen availability to microorganisms that derive their energy by oxidated decomposition of carbon compounds. Organic matter accumulated faster than it decomposed forming the Everglades Histosols. When the area was drained for settlement and agricultural use, oxygen permeated the soil mass, decomposition accelerated, and the organic matter began to decompose faster than it accumulated. This

> caused the surface elevation to fall, a phenomenon known as subsidence.

(*Plain. Ex. 128*, pp. 37-38). The muck soils are naturally very high in phosphorous. (*See Trial Tr. Feb. 10, 2006*, 61:3-15).

D. Water Flow in the Everglades

Today, almost all water flow in the Everglades is through man-made conveyance structures. Given that the system has been significantly modified from its natural state, it is important to distinguish between the flow of water today, flow that is primarily regulated by the SFWMD (along with the Corps), and the natural flow of water through the system.

1. *Natural Water Flow*

Historically, Lake Okeechobee's surface water, subsurface flow, and localized rainfall supplied water for the Everglades. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 7). In its natural state, the Everglades was a unified hydrologic system. (*See, e.g., Trial Tr. Jan. 9, 2006*, 208:16-209:5; *Trial Tr. Jan. 10, 2006*, 140:15-141:4; *Trial Tr. Jan. 11, 2006*, 75:5-18; *Trial Tr. Feb. 8, 2006*, 203:25-204:7; *Trial Tr. Feb. 10, 2006*, 78:22-79:6, 81:8-22, 94:3-7; *Def. Ex. 207*, p. 21). Water moved freely between surface and ground water. (*See Trial Tr. Feb. 10, 2006*, 82:6-16).

Prior to the man-made modifications to the system, water generally flowed slowly south, over the flat South

Florida landscape to the sea.[19] (*See Joint Pretrial Stip.*, Attach. 5A ¶ 7). Land to the south of the Lake slopes very slightly to the south. (*See Trial Tr. Jan. 19, 2006*, 177:4-10). In fact, the slope is far flatter than the slope of a sidewalk. (*See id.*, 177:11-19). Due to the nearly flat slope of the land, water flowed south at an exceedingly slow pace. (*Id.*, 178:5-12). This historic water flow is depicted on a United States Geological Survey map that was introduced into evidence (the map was made using SFWMD data). (*Plain. Ex. 58; see also Trial Tr. Jan. 19, 2006*, 34:17-36:25).

Historically, the water of the Lake would rise until it overtopped a natural muck berm along the southern shoreline, and then it would spill into the vast marsh known as the Everglades. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 47a; *see also Trial Tr. Jan. 13, 2006*, 51:13-17). Water in the Lake would overcome the levy when the Lake reached an elevation of 21.5 feet. (*Trial Tr. Jan. 9, 2006*, 208:25-209:5). During the rainy season, water from Lake Okeechobee would flow in a gradual

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19. When the Miami Canal was first dredged across the Everglades from its entrance at the Rita River to the headwaters of the Miami River, a navigation lock was constructed in the canal just a short distance south of the southern shore of Lake Okeechobee. (*See Trial Tr. Jan. 9, 2006*, 182:8-189:1; *Plain. Exs. 16F, 16G*). A photograph of the lock shows the doors opening to the north. (*See Trial Tr. Jan. 9, 2006*, 186:7-14; *Plain. Exs. 16G, 42, 46*). Lock doors are designed to open against the direction of flow (*see Plain. Exs. 42, 46*), confirming that the direction of flow in the Miami Canal was generally from the north to the south. (*See Trial Tr. Jan. 9, 2006*, 186:11-14; *Plain. Exs. 16G, 42, 46*).

sheet through the Everglades to Florida Bay.[20] (*See id.; Trial Tr. Feb. 10, 2006*, 81:18-19). Occasionally (during some years) the water would flow across the coastal ridge to the Atlantic Ocean. (*Trial Tr. Jan. 13, 2006*, 51:18-22).

Localized events such as wind or rainfall could affect the general southward flow of water over short periods of time. (*Trial Tr. Jan. 19, 2006*, 178:13-179:6). In other words, the southward flow, at least historically, was intermittent. (*See id.*, 180:7-18). During severe windstorms, hurricanes or other meteorological events, water could flow north from the Everglades to the Lake. (*See, e.g., Trial Tr. Jan. 9, 2006*, 193:4-20; *Trial Tr. Jan. 10, 2006*, 156:22-158:16; *see also Plain. Ex. 16C*, p. 3; *Def. Ex. 302*, ¶ 7). There are historic accounts of people observing wind and water conditions causing water to flow in this direction. (*See Trial Tr. Jan. 9, 2006*, 212:2-18, 216:6-25). Water was also capable of seeping through the porous soil matrix of the Everglades in both directions, *i.e.*, from the Lake to the Everglades and from the Everglades to the Lake. (*See Trial Tr. Jan. 13, 2006*, 53:10-13; *Trial Tr. Feb. 10, 2006*, 81:13-17).

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20. "Florida Bay is a shallow inner-shelf lagoon located at the southern end of the south Florida watershed. It is an area where fresh water from the Everglades mixes with the salty waters from the Gulf of Mexico to form an estuary that is surrounded by mangrove forests and encompasses over 200 mangrove islands." The Florida Bay Education Project, http://www.floridabay.org/intro.shtml.

Appendix D

2. *Water Flow Today*

a. Surface Water Flows Generally

Most water flows today are regulated. As a managed system, the natural flow of water has been replaced by a series of man-made structures, and water is now routed through a very complex series of conveyance systems. (*See Trial Tr. Jan. 26, 2006*, 20:1-6). The waters are managed as a whole. (*Joint Pretrial Stip.*, Attach. 5B ¶ 21).

Navigable waters in the C&SF canals and waters in the Lake certainly intermingle, whether by natural or man-made forces. (*Trial Tr. Jan. 12, 2006*, 88:23-89:17). For example, water in the Lake is released into the canals at certain times and may be pumped back into the Lake at other times. (*Id.*). However, whereas historically the water flowed almost exclusively to the Everglades, today much of the water flow is directed to the coast. (*Trial Tr. Jan. 10, 2006*, 25:20-25).

Because water flows on a downgrade, water in the Lake flows by gravity to the south whenever the SFWMD opens the gated spillways and culverts that feed water from the Lake into the canals. (*See Trial Tr. Jan. 12, 2006*, 82:2-83:3; 89:8-13). Water from the canals generally is not capable of flowing into the Lake because it would have to flow on an upgrade. (*Trial Tr. Jan. 10, 2006*, 112:4-12; *Trial Tr. Jan. 17, 2006*, 7:1-8:1). Thus, as in its natural state, water generally flows from Lake Okeechobee south to the EAA. (*See Trial Tr. Jan. 18*,

2006, 96:24-97:4). Indeed, Plaintiffs' witness, Herbert Zebuth, who spent the bulk of his extensive career working on issues concerning Lake Okeechobee, testified that "I have never heard anyone talk about the Everglades flowing into Lake Okeechobee until this lawsuit was filed." (*Trial Tr. Jan. 17, 2006*, 9:22-23).

Nevertheless, the hurricane gates adjacent to the S-2 and S-3 pump structures may allow gravity flow from the canals into the Lake when the water level in the Lake is lower than the water level in the canals. (*See Trial Tr. Jan. 13, 2006*, 118:1-5; *Trial Tr. Jan. 17, 2006*, 8:2-4; *Plain. Ex. 115*, p. 170). Under such circumstances, and without the aid of the pump stations, surface water in the EAA canals can, and does, flow north into Lake Okeechobee. Such instances, however, remain very rare. (*See Trial Tr. Jan. 18, 2006*, 97:4-13; *Trial Tr. Jan. 19, 2006*, 37:18-21; *Plain. Ex. 115*, p. 170; *Def. Ex. 203*, p. 57; *Def. Ex. 202*, pp. 335, 345-47, 385-86, 406, 411, 551; *Def. Ex. 207*, p. 23). Moreover, the frequency of northern flow has been reduced by the Corps' removal of "humps" in the canals that had previously served as impediments to the canal waters' steady southward flow. (*See Trial Tr. Jan. 18, 2006*, 114:2-12; *Trial Tr. Jan. 25, 2006*, 25:13-15).

Every year, a substantial amount of water is discharged from the Lake to tide (*i.e.*, large quantities of Lake water are dumped into estuaries) in order to reduce the amount of water in the Lake, for example, when the water level in the Lake becomes too high. (*See Trial Tr. Jan. 19, 2006*, 51:2-8). Obviously, the

discharges, resulting in the loss of, on average, approximately 1.7 billion gallons of water to tide per day from the Everglades system, are undesirable. (*See Trial Tr. Jan. 20, 2006*, 145:14-16). However, at present, it appears that the losses are unavoidable. Because Florida experiences periods of heavy rainfall that produce water that the system is incapable of assimilating, the excess water must be discharged. (*See Trial Tr. Jan. 19, 2006*, 163:3-15). The rainy periods are followed by dry periods during which water becomes scarce. (*See id.*). The problem is exacerbated by the inability to predict weather conditions with any degree of accuracy. (*See id.*, 168:9-11, 169:17-170:14).

b. Surface Water Flow in the EAA

The Hillsboro, North New River, and Miami Canals, as well as the C-20 and C-21 Canals, collect water that is drained from their respective basins. Industrial, municipal, and construction activities are conducted within the basins. Thus canal water contains byproducts of industrial, municipal and construction activities. (*Trial Tr. Jan. 13, 2006*, 113:14-115:19).

Agricultural activities contribute immensely to the amount and direction of water flows in the EAA. When there is excess water on the farmlands, farmers pump the excess water into the canals. (*See Trial Tr. Feb. 10, 2006*, 39:23-41:10).[21] Conversely, when the farmers

21. There are approximately 300 pump stations used by the farmers in the EAA that discharge water into the SFWMD's main canals. (*Trial Tr. Feb. 9, 2006*, 32:2-4).

require water for irrigation, they withdraw water from the canals through a variety of mechanisms. (*See Trial Tr. Jan. 25, 2006*, 12:21-13:24). Each activity — taking and discharging water — requires a SFWMD permit. (*See Trial Tr. Feb. 9, 2006*, 102:4-104:15).[22]

c. Sub-Surface Water Flows

The Lake and the EAA canals are also hydrologically connected through seepage (*i.e.*, the flow of fluid through soil pores). The groundwater and surface waters of the Everglades are highly interrelated (*Trial Tr. Jan. 20, 2006*, 111:2-8), and are only truly separated in isolated areas. (*See id.*, 111:2-8, 120:7-13). Moreover, water flows through the Dike in both directions, that is, from the Lake to the EAA and vice-versa. (*See Trial Tr. Jan. 13, 2006*, 109:14-110:6; *Trial Tr. Feb. 8, 2006*, 208:2-3, 213:3-24; *Trial Tr. Feb. 9, 2006*, 7:17-20, 9:20-10:2, 24:1-3).[23] Seepage is possible because the material of which the Dike is constructed is porous. (*See Trial Tr. Feb. 8, 2006*, 209:2-210:4).

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22. Generally, farmers drain their lands during the wet season and irrigate their lands during the dry season. (*Joint Pretrial Stip.*, Attach. 5A ¶ 44). Farmers seek to maintain an optimal level of moisture in their fields; a level that depends upon the particular crop being cultivated and the stage within the planting cycle. (*See Trial Tr. Feb. 10, 2006*, 53:2-54:1).

23. Such seepage is common to all lakes. (*Trial Tr. Jan. 13, 2006*, 109:25-110:1; *Trial Tr. Feb. 9, 2006*, 11:4-6).

Appendix D

The direction that water will flow, both above and below the ground, depends on the soil matrix (porosity of the soils), and the difference in water level (water always flows from higher to lower elevations). (*See Trial Tr. Jan. 18, 2006*, 97:8-13; *Trial Tr. Feb. 8, 2006*, 208:4-209:16). Although seepage generally occurs from the Lake to the EAA (*see Trial Tr. Feb. 9, 2006*, 21:2-8), it can also flow in the opposite direction. (*See Trial Tr. Feb. 8, 2006*, 213:22-25; *Def. Ex. 244*, pp. 29-30, 32, 73).

Comprehensive studies have documented water seepage through the Dike. (*See Def. Exs. 248, 249*). The amount of seepage through the Dike, however, is small in comparison to the amount of water moved by the pump stations. (*Trial Tr. Feb. 9, 2006*, 13:2-5). Indeed, the amount of seepage is so small that the Corps does not consider seepage losses in computing the Lake's monthly water budget (total water flows into and out of the Lake). (*Def. Ex. 211*, p. 23).[24] The amount of seepage through the Dike is constantly changing, depending upon a variety of factors including, most notably, the elevation of the Lake.[25] (*See Trial Tr. Feb. 9, 2006*, 6:25-7:9).

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24. Specifically, the water budget states that "seepage is not considered as a loss from Lake Okeechobee because it is only a minor amount of the normal range of operations." (*Def. Ex. 211*, p. 23).

25. The elevation of water in the Lake is almost always higher than the elevation of water in the canals, the exception being during periods of extreme drought. (*Joint Pretrial Stip.*, Attach. 5A ¶ 17).

Appendix D

E. The Pump Stations

Although the water flows in the Everglades are controlled by numerous conveyance structures, this case focuses upon only three of the structures, the S-2, S-3, and S-4 pump stations, which are located at the southern end of the Lake.

1. *Description of Pump Stations*

The S-2, S-3, and S-4 pump stations are built into the Dike where the Dike intersects the EAA canals. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 12; *Trial Tr. Feb. 8, 2006*, 205:25-206:3). The pump stations, which were constructed by the Corps (*see Trial Tr. Jan. 19, 2006*, 57:7-10), are flow diversion facilities that change the movement, flow and circulation of the waters they control. They convey water from the Miami, North New River, Hillsboro, and C-20 and C-21 canals to Lake Okeechobee. (*Joint Pretrial Stip.*, Attach. 5A ¶ 13). The rim canal, which runs along the south shore of the Lake, is the immediate receiving body of water from the pumps. (*Trial Tr. Jan. 10, 2006*, 82:16-17; *Trial Tr. Jan. 19, 2006*, 75:16-19; *Plain. Ex. 115*, p. 170).

The pumping of water from the S-2, S-3, and S-4 pump stations into the Lake has long been described as "backpumping." (*See Def. Ex. 110*, cover). Backpumping by the SFWMD has artificially added three basins totaling over 400 square miles to the watershed of Lake Okeechobee, all of which would have drained to either the south or west under natural conditions. (*See Plain.*

Ex. 110, p. 1).[26] The S-2, S-3, and S-4 pump stations have the capacity to pump excess drainage into the Lake from the northern one-third of the EAA.[27] (*See Plain. Ex. 115*, p. 166). The southern two-thirds of the EAA are drained by pump stations S-5A, S-6, S-7, and S-8, which pump water into the Water Conservation Areas. (*See id.*).

The distance between the intake of water and outflow of water through the S-2, S-3, and S-4 pump stations is less than 60 feet. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 27). When the pumps are turned on, they immediately lower the water level in the canal at the entrance to the pump station (*Trial Tr. Jan. 25, 2006*, 14:7-15), and the water is thus artificially induced to flow by gravity toward the pump station. (*See Trial Tr. Jan. 20, 2006*, 131:22-132:5). The pump stations are designed with the capacity to remove 3/4 of an inch of water (rain) per day from their respective basins. (*Joint Pretrial Stip.*, Attach. 5A ¶ 16; *Trial Tr. Jan. 13, 2006*, 64:9-11).

The pump stations convey "navigable waters" without subjecting the waters to any intervening industrial, municipal or commercial use. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 2; *see also Trial Tr. Feb. 13, 2006*, 102:10-12). Moreover, the pump stations do not introduce anything to the water as it moves through the stations. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 3).

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26. The calculations are based upon the pumps operating at full capacity.

27. The stations do not necessarily pump water from the entire area.

Appendix D

All constituents in the waters transferred by the S-2, S-3, and S-4 pump stations (e.g., phosphorous and nitrogen) are already present in the waters when they enter the pumps, either because they occur naturally or because they were introduced to the waters by some other source or land use upstream of the pump stations. (*See id.*, ¶ 28). Neither the disposal of waste (*Trial Tr. Jan. 13, 2006*, 150:24-151:18), nor the assimilation of waste (*Trial Tr. Jan. 20, 2006*, 118:20-25), may be properly characterized as a goal of the SFWMD's backpumping activities.

Each pump station contains three or four pumps, each of which is powered by a diesel engine approximately the size of three tractor-trailer engines. (*Trial Tr. Jan. 12, 2006*, 65:19-66:8; *Trial Tr. March 2, 2006*, 83:11-16). Each engine, in turn, drives a pump with an impellor that is 12 feet in diameter. (*Trial Tr. Jan. 12, 2006*, 65:17-66:2). The pumped water is discharged through a tube. (*See Trial Tr. Jan. 25, 2006*, 29:16-30:1). Massive quantities of water may be moved through the S-2, S-3, and S-4 pumps (each pump is capable of transporting approximately 900 cubic feet of water per second). (*See Trial Tr. Jan. 12, 2006*, 66:19-24; *Trial Tr. Jan. 13, 2006*, 80:16-17). The flow rate from just one of the pump stations operating at full capacity is comparable to the flow of a medium-sized Florida river. (*See Trial Tr. Jan. 12, 2006*, 67:4-6).

The S-2 pump station, located at the northern end of the Hillsboro and North New River Canals, was designed to pump excess water from the 180 square mile

S-2 drainage basin transected by the canals. (*Def. Ex. 218*, p. A-S2-1). The S-2 basin includes agricultural areas and the cities of South Bay and Belle Glade. (*Def. Ex. 200*, p. 29).

The S-3 pump station is located at the northern end of the Miami Canal and was designed to pump water from the surrounding 129 square mile S-3 basin. (*Def. Ex. 218*, p. A-S3-1). The S-3 basin includes agricultural areas and the city of Lake Harbor. (*Def. Ex. 200*, p. 52). The dominant land use in both the S-2 and S-3 basins is agriculture. (*Trial Tr. Feb. 10, 2006*, 109:18-22).

The S-4 pump station conveys water to the Lake from the 116 square mile S-4 drainage basin (sometimes referred to as the Nine Mile Canal Area). (*Def. Ex. 218*, p. A-S4-1, A-Ind-iii). The S-4 basin includes the agricultural area to the west of Clewiston and sometimes includes the City of Clewiston. (*Def. Ex. 200*, pp. 67, 69). The S-4 pump station conveys water from the C-20 and C-21 canals (three miles northwest of Clewiston) to the Lake. (*Trial Tr. Jan. 19, 2006*, 74:15-75:1).

The water backpumped into Lake Okeechobee contains at least the following pollutants: color, nitrogen, phosphorous, total suspended solids, high biological demand, dissolved solids (including dissolved organics), low quantities of dissolved oxygen, and un-ionized ammonia. (*Plain. Ex. 94*, App. F; *Plain. Ex. 9*, pp. 41-46; *Trial Tr. Jan. 9, 2006*, 50:17-51:21, 88:4-15, 93:6-20; *Trial Tr. Jan. 17, 2006*, 5:16-6:24).

Appendix D

2. *Reasons for Backpumping*

The S-2, S-3, and S-4 pump stations are integral components of the C&SF Project. (*See Trial Tr. Jan. 18, 2006*, 97:14-19; *Trial Tr. Jan. 20, 2006*, 112:20-113:3; *Trial Tr. Feb. 10, 2006*, 102:23-103:22; *Def. Ex. 205*, p. 42). The pump stations provide flood protection for the basins, communities and agricultural areas that they service. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 26). Water management is essential to maintaining the agricultural activity in the EAA. (*See id.*, Attach. 5A ¶ 44). Indeed, the S-4 pump station is the only option for flood protection for the City of Clewiston. (*Trial Tr. Feb. 10, 2006*, 110:11-12).

The "tremendous majority" of backpumping episodes are meant to dispose of flood water. (*Trial Tr. Jan. 13, 2006*, 179:23-180:1). The trigger for backpumping occurs at the S-2 and S-3 pump stations whenever the water at any point in the canal reaches a level of 13 feet National Geodetic Vertical Datum ("NGVD").[28] (*Trial Tr. Jan 20, 2006*, 129:6-130:17). The trigger for backpumping at the S-4 pump station occurs whenever water in the canal reaches a level of 14 feet NGVD. (*Def. Ex. 200*, p. 66).

Flood control backpumping occurs even when the water level in Lake Okeechobee is at 18 feet (*see Trial Tr. Jan. 25, 2006*, 16:23-24), a level at which the integrity of the levee is called into question (*see id.*, 15:25-16:24),

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28. NGVD is equivalent to "above mean sea level."

and a level at which the Corps is making maximum "regulatory releases" to tide (*i.e.*, dumping large quantities of Lake water into the Caloosahatchee and St. Lucie River estuaries). (*Trial Tr. Jan. 19, 2006*, 40:3-43:4; *Def. Ex. 218*, Figures 7-1, 7-3). Failure to operate the S-2, S-3, or S-4 pump stations during severe rain events would cause flooding in communities and farmlands throughout the S-2, S-3, and S-4 basins. (*See Trial Tr. Jan. 20, 2006*, 136:21-137:8).

On rare occasions, backpumping occurs for water supply purposes.[29] Before the SFWMD may backpump for water supply purposes, it must declare a water supply emergency. (*See Trial Tr. March 2, 2006*, 21:12-17; *Plain. Ex. 228*). Once an emergency is declared, the Florida Department of Environmental Protection (the "DEP") issues an order authorizing the SFWMD to backpump for water supply purposes. (*Plain. Ex. 228*). The SFWMD backpumped for water supply purposes in 1980-81, 1985-86, 1988-89, and 2000-01. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 53; *Trial Tr. Jan. 10, 2006*, 37:9-18; *Plain. Ex. 228*).

In its report to the DEP after the 2001 drought, the SFWMD distinguished backpumping conducted for "water supply augmentation" purposes from backpumping for the purpose of flood protection, although both types of backpumping occurred within the same time period. (*Plain. Ex. 29*, p. 2). The SFWMD

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29. Several municipalities obtain their drinking water from Lake Okeechobee.

explained that the flood control backpumping events "were not considered part of the water supply augmentation efforts" and their effects on the Lake were thus not covered in the report. (*Plain. Ex. 29*, p. 2; *see also Trial Tr. Jan. 17, 2006*, 68:23-69:1).

F. Effects of Backpumping on Lake Okeechobee

While the extent of the adverse effects of backpumping on the Lake is not conclusive, that the backpumping has adversely affected the Lake is not in dispute. It is important, however, to distinguish between backpumping today and backpumping in the past as, over the last 25 years, significant efforts have been made to reduce backpumping to the Lake. The following discussion highlights the conclusions of different studies conducted throughout the years.

1. *1970s Studies*

Plaintiffs entered into evidence a Florida Department of Environmental Regulation (the "DER")[30] study from August 1975, entitled "Effects of Backpumping from Agricultural Drainage Canals on Water Quality in Lake Okeechobee." (*See Plain. Ex. 110*). The report referenced a 1971 study that found that water backpumped from the Miami, Hillsboro, and North New River Canals was the poorest quality of all

30. The Department of Environmental Regulation (the "DER") was the previous name of the DEP. *See, e.g., Southwest Florida Water Mgmt. Dist. v. Charlotte County*, 774 So. 2d 903, 907 n.7 (Fla. 2d DCA 2001).

water sources to Lake Okeechobee. (*Id.*, pp. 8-10). The study noted that "[a]erial sampling demonstrated measurable influences of the drainage water (backpumped water) throughout the South Bay area of Lake Okeechobee and several miles northward in the open water." (*Id.*, abstract). The DER study ultimately found that "backpumping is [] an important cause of eutrophication[31] for Lake Okeechobee." (*Id.*).

In 1978, the SFWMD authored a study entitled "Water Quality in the Everglades and its Impact on Lake Okeechobee." (*See Plain. Ex. 109*). The study found that, at the rim canal — the immediate receiving body of the backpumped water — "[n]itrogen, phosphorous, and conductivity were all higher during backpumping periods, while dissolved oxygen concentrations were lower." (*Id.*, p. 8; *see also Trial Tr. Jan. 10, 2006*, 33:15-18). The study further found that the effects of backpumping became less noticeable further into the Lake. (*Plain. Ex. 109*, p. 8). The immediate zone of influence of backpumping did not extend more than four miles from the pumps. (*See id.*; *Trial Tr. Jan. 10, 2006*, 33:19-34:4). Moreover, the study concluded that from May 1973 through May 1977, the EAA contributed 15% of the total phosphorous input, and 35% of the total nitrogen input, to the Lake. (*Plain. Ex. 109*, p. 9)

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31. Eutrophication refers to the process by which a lake becomes increasingly biologically productive (meaning more photosynthesis takes place) as nutrients are added to the water body. (*See Trial Tr. Jan. 9, 2006*, 39:3-9, 66:7-67:3).

Appendix D

2. *1981 Water Supply Backpumping Event*

In 1981, as a result of an extended drought, the SFWMD backpumped water for water supply purposes. The SFWMD subsequently issued a report on the effects of this backpumping event on the water quality of the Lake. (*See Plain. Ex. 115*). Only the S-2 and S-3 stations pumped during the event. (*Id.*, p. 166).

The study found that conductivity increased at the sampling site near the S-2 and S-3 pump stations although it had decreased during the same time period throughout the remainder of the Lake. (*See id.*, p. 173). The report noted that highly mineralized canal water remained largely undiluted as far as eight kilometers into the Lake. (*Id.*). The study concluded as follows:

> The data presented here show that S-2 and S-3 discharges influenced water quality in the lake at least as far as station 6, which is 14.0 km from the south shore. This indicates that these inflows affected a far greater area than has been shown in previous studies. . . . The more widespread impact resulted from the diminished dilution capacity of the lake and the highly intense discharge from the EAA.

(*Id.*, p. 178).

Appendix D

3. *1996 Backpumping Study*

In 1996, the SFWMD drafted a report entitled "Evaluation of Water Quality Criteria in the Everglades Protection Area." (*See Plain. Ex. 9*).[32] The SFWMD tested thirteen water quality parameters,[33] comparing water quality during periods of backpumping and no-backpumping. (*Plain. Ex. 9*, p. 46; *Trial Tr. Jan. 9, 2006*, 86:21-22). The study found that there was statistically significant worsening in twelve of the thirteen water quality parameters when S-2 was operating, eight of the thirteen parameters when S-3 was operating, and ten of the thirteen parameters when S-4 was operating. (*Plain. Ex. 9*, p. 46; *Trial Tr. Jan. 12, 2006*, 52:1-56:21). However, the study also found that "[a]lthough backpumping events did transfer nutrients and other pollutants at some level into the lake, overall water quality impacts to the lake could not be established due to effects of dilution, pollutant decay, particulate settling, and nutrient uptake which were not considered in [the] study." (*Plain. Ex. 9*, p. 44).

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32. It does not appear that a final version of the report, if one exists, was entered into evidence.

33. The parameters were: alkalinity as CaCO3, field conductivity, dissolved oxygen, pH, total suspended solids, turbidity, total chloride, total phosphorous, ortho-phosphorous, total nitrogen, nitrate and nitrite, ammonia dissolved and total kjeldahl nitrogen. (*See Plain. Ex. 9*, p. 46).

Appendix D

4. *2001 Backpumping Event*

In 2001, drought conditions again required the SFWMD to backpump for water supply purposes. On December 14, 2001, the SFWMD submitted its "Lake Okeechobee Water Supply Backpumping and Water Supply Augmentation After Action Report." (*See Plain. Ex. 29*). Herbert Zebuth characterized the 2001 study of backpumping as the most thorough he had ever seen. (*Trial Tr. Jan. 18, 2006*, 10:16-20, 22:6-15).

The report found that "biological monitoring indicated no negative impacts of the backpumping operation on SAV [submerged aquatic vegetation] or water transparency." (*Plain. Ex. 29*, p. 4). Ultimately, the report concluded that an "[a]nalysis of the data collected in the Water Quality and Biological Monitoring programs associated with the emergency final orders did not indicate adverse impacts to Lake Okeechobee attributable to the emergency water supply backpumping and flow augmentation operations." (*Id.*, p. 8). Furthermore, no large algal blooms were reported as a result of the 2001 water supply backpumping event. (*Trial Tr. Jan. 11, 2006*, 23:19-24:2).

The final SFWMD study is in some respects contradictory to a draft of an article entitled "Effects of Pumping Rainfall Runoff from Agriculture Fields into Lake Okeechobee." (*See Plain. Ex. 18*). The draft, which studied the effects of the 2001 backpumping event on Lake Okeechobee, concluded as follows:

Appendix D

Water quality monitoring documented poorer light penetration and chlorophyll and nutrient levels up to an order of magnitude higher at the impact site. Along with measurable levels of six heavy metals, five pesticides were found in backpumped water. When compared with data from backpumping in the 1970's, the magnitude of difference in nutrients between backpumped and reference water was comparable to 2001. Although not lethal, there were some negative ecological impacts of backpumping on SAV [submerged aquatic vegetation] communities of Lake Okeechobee. There appeared to be some impacts on Vallisneria, with a lower number of blades (and smaller photosynthetic surface area) in the impact water after two weeks. By four weeks, however, these differences disappeared. Results from the short duration of these incubations does [sic] not indicate whether long-term impacts on Vallisneria might be apparent. In contrast, there was significantly lower biomass of Chara in the backpumped assays, attributed to extensive epiphytization and the development of a sediment algal mat. It is unknown to what extent this nuisance benthic algal mat might influence emergence of growth of SAV in the field.

(*Plain Ex. 18*, p. 1). The source of the seemingly inconsistent conclusions was not clarified at trial.

Appendix D

5. *Karl Havens' Experiment*

Over time, scientists theorized that because the algal blooms that adversely impacted the Lake were believed to have been caused by low nitrogen/phosphorous ratios, one solution to the problem might include pumping nitrogen-rich waters, such as the waters from the EAA, into the Lake. (*See Plain. Ex. 52*, p. 1). Karl Havens, a scientist with the SFWMD, conducted an experiment pursuant to which he added canal water to Lake water to determine whether backpumping might have any positive effects. (*See id.*). Specifically, he wanted to determine whether backpumping could decrease the amount of blue/green algae in the Lake. (*See id.*). The idea was that by changing the total nitrogen/phosphorous ratios in the Lake through the introduction of backpumped waters, the nature of the algal communities in the Lake could be beneficially altered. (*See Trial Tr. Jan. 18, 2006*, 39:10-20).

Mr. Havens ultimately concluded that "the results of [the] study indicate a risk for ecological damage if backpumping of EAA canal water was substantially increased." (*See Plain. Ex. 52*, p. 35). The report further warned against increased backpumping without additional experimentation and found that even if there were benefits that could result from backpumping, backpumping only represented a temporary fix to the Lake's problems. (*See id.*).

Appendix D

6. *Effects of Backpumping on Drinking Water*

Lake Okeechobee serves as the drinking water source for the cities of Belle Glade, Clewiston and South Bay, among others. (*Joint Pretrial Stip.*, Attach. 5A ¶ 6). When backpumping occurs, the City of South Bay's drinking water plant experiences increases in the water's hardness, turbidity and color. (*Id.*, ¶ 25). The SFWMD has received complaints from South Bay, Belle Glade, Pahokee and Clewiston that backpumping causes an unpleasant odor and taste in the cities' water supplies. (*Plain. Ex. 65C*). Therefore, the SFWMD sends advance notification of impending backpumping events to the City of Belle Glade. (*Id.*). Furthermore, the 2001 emergency order that the DEP issued to the SFWMD authorizing water supply backpumping required that the SFWMD reimburse the cities surrounding the Lake for any increased costs of water treatment caused by the backpumping. (*Trial Tr. Jan. 12, 2006*, 136:19-137:1; *Plain. Ex. 54; Plain. Ex. 117*, p. 7).

Dr. William Wise, a hydrologist, environmental engineer, and chemist, testified that he visited three water treatment plants eight days after a two-day S-2 backpumping event that occurred during the trial. (*Def. Ex. 124; see also Trial Tr. Feb. 15, 2006*, 16:7-9).[34] The intake water at the South Bay plant (which Plaintiffs claim is closest to the S-2 pump station) was noticeably colored and significantly darker than intake water from

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34. The backpumping occurred from February 4, 2006 through February 6, 2006. (*Trial Tr. March 2, 2006*, 16:5-6).

the Belle Glade or Pahokee plants. (*Trial Tr. Feb. 15, 2006*, 16:23-17:2, 54:9-55:11). Dr. Wise attributed the poor water quality at the water intakes to the backpumping episode. (*Id.*, 55:12-15).

Defendants, however, presented testimony that the water quality issues were likely caused by dredging activities that became necessary as a result of the 2005 hurricane season, and not the backpumping event. (*See Trial Tr. March 2, 2006*, 46:5-24). Defendants presented further testimony that, in fact, Belle Glade, as opposed to South Bay, is the closest intake structure to the S-2 pump. (*Id.*, 85:22-86:1).

G. Similarities and Differences Between the Lake and the Canals

As noted, the Lake is by no means a uniform body of water and there is much variability between and within the different regions of the Lake. Moreover, the rim canal of the Lake, the immediate receiving body of backpumped waters, is more similar chemically to the EAA canals than is the rest of Lake Okeechobee.[35] (*See Trial Tr. Jan. 9, 2006*, 120:14-121:6; *Trial Tr. Jan. 10, 2006*, 149:14-21). Additionally, it is important to note that most of the water in the canals likely originated in Lake Okeechobee. (*Trial Tr. Feb. 10, 2006*, 118:25-119:3). Notwithstanding the commonality of elements, several

35. Although the water in the rim canal is similar to the waters in the canals in many respects, a plume is still visible when water is backpumped into the rim canal. (*Trial Tr. Jan. 9, 2006*, 120:23-25).

witnesses testified that there are certain characteristics unique to the canals while other characteristics are unique to the Lake.

1. *Structural Characteristics*

The canals are cut into the bedrock. (*Trial Tr. Jan. 17, 2006*, 13:7-10). Consistent with their role as water conduits, they were designed and constructed to have vertical sides and a flat bottom. (*Joint Pretrial Stip.*, Attach. 5A ¶ 20; *Trial Tr. Jan. 10, 2006*, 91:7-92:1; *Trial Tr. Jan. 12, 2006*, 70:10-18). In contrast, the Lake was most likely formed as a result of the uneven settling of materials during the period when Florida rose above the ocean. (*Trial Tr. Jan. 17, 2006*, 12:25-13:6). Thus, the Lake has taken the form of a bowl-shaped depression. (*See id.*).

The structural differences between the Lake and the canals mean that the Lake is subject to winds and other physical forces that do not affect the canals in a meaningful way. (*Trial Tr. Jan. 12, 2006*, 70:15-18). On a related note, the waters of the Lake mix far more than do the canal waters. (*Id.*, 85:9-12). As a result of the different mixing regimes, chemicals that enter the canals have a longer residence time than do those entering the Lake. (*Id.*, 85:12-15).

2. *Water Quality*

The canals and the Lake are classified differently under Florida and federal law. Unless otherwise delineated, "[t]he surface waters of the State of Florida

are classified as Class III." Fla. Admin. Code r. 62-302.400(1). The canals are designated as Class III waters, to be used for recreation and propagation and maintenance of a healthy, well-balanced population of fish and wildlife. (*Joint Pretrial Stip.*, Attach. 5A ¶ 19; *see also* Fla. Admin. Code r. 62-302.400(4)).

In contrast to the Class III designation of the canals, Florida has designated Lake Okeechobee as a Class I water body, or potable water supply. (*Joint Pretrial Stip.*, Attach. 5A ¶ 6; *see also* Fla. Admin. Code r. 62-302.400). As a Class I water body, the Lake must meet more stringent water quality criteria than the Class III canals. (*Joint Pretrial Stip.*, Attach. 5A ¶ 22). The total maximum daily load ("TMDL") of a particular pollutant permitted to enter a Class I water body will often be less than the load permitted to enter a Class III water body. (*See Trial Tr. Jan. 17, 2006*, 32:22, 33:7-9). Nevertheless, there are many similarities in water quality standards for Class I and Class III waterways (*i.e.*, the criteria for some pollutants are identical). (*See id.*, 32:7-33:13).[36]

As would be anticipated, the water quality in the Lake is generally better than the water quality in the

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36. A water body may have multiple classifications. For instance, a river may be classified as a Class I water body at one point and be classified as a Class III water body downstream, or vice-versa. (*See Trial Tr. Jan. 17, 2006*, 37:13-25). The different classifications may exist even though there is no physical boundary marking the dividing point between the two classifications. (*See id.*, 42:15-17).

canals. A September 2005 draft report from the Corps addresses water quality in the Lake and the canals. (*See Plain. Ex. 94; Def. Ex. 32*). The study utilized data collected from June 4, 1973 through January 18, 2005. (*Id.*, F-86). It concluded that "[i]n both S-2 and S-3, water quality exiting [Lake Okeechobee] was of higher quality than water entering [Lake Okeechobee]." (*Id.*, F-89). As compared to the Lake, the canal waters were higher in most nutrients and lower in dissolved oxygen (at least at S-2 and S-3). (*See id.*, F89-91).

The differences in nutrient levels between the canals and the Lake are not surprising. Although canal waters largely originate in the Lake, the canals also receive runoff from the EAA, including waters pumped off of agricultural lands. Additionally, the muck soils in the EAA were formed from partially decomposed plants, causing the soils to have a different chemistry than the sand bottoms of the Lake.[37] (*Trial Tr. Jan. 10, 2006*, 90:1-8; *see also Def. Ex. 243*, pp. 27-28). As the universal solvent, water picks up the characteristics of its location. (*See Trial Tr. Jan. 20, 2006*, 53:10-12; *see also Trial Tr. Feb. 10, 2006*, 119:3-7). Thus, the waters in the canals have incorporated many of the natural characteristics of the EAA.

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37. Wetlands tend to have low dissolved oxygen even in their natural state. (*See Trial Tr., Jan. 9, 2006*, 118:14-19).

Appendix D

3. *Biology*

In a well-taken analysis, Dr. Thomas Crisman, professor of environmental science at the University of Florida and director of the Odum Center for Wetlands, explained that

> within any eco-system type there can be a great deal of variability, but when you are looking at the variability that takes place within Lake Okeechobee, that's variability among biological components that are lake components. When you look at variability within the canals, it's variability within the components that are characteristics of canals.

(*Trial Tr. Jan. 9, 2006*, 46:5-12).

Many species of birds thrive in shallow waters. (*See Trial Tr. Jan. 10, 2006*, 90:24-91-12). The Lake contains many shallow areas in which birds may wade. (*See id.*). However, because the canals have steep walls, birds generally are not capable of wading in the canals unless the water level is extremely low. (*See id.*). Furthermore, the big broad flats of the Lake allow certain plants to live in the Lake that are unable to live in the far narrower canals. (*See id.*, 91:13-19).

Additionally, as explained by biologist Dr. Paul Gray, whose expertise is in the area of lake ecology and ducks,

> [c]anals, because of their nature, go up and down very rapidly. If you are a bird, you are

> depending on the canal to get a steady supply of food. You have to keep your young alive. You can't rely on a canal. . . . Canals are just not the same [type] of habitat ecologically for various marsh organisms. . . . The lack of a normal hydrology, the lack of shallow water, the lack of expanse of habitat really makes canals a lot different from Lake Okeechobee . . . .

(*Id.*, 91:23-92:19; *see also Trial Tr. Jan. 17, 2006*, 14:7 (biological differences between Lake and canals are "severe")). Dr. Gray added that "canals don't have the same water cycle vegetation, the same spatial extent. They are very different." (*Trial Tr. Jan. 10, 2006*, 94:1-3).[38]

H. Programs Addressing Current Environmental Problems

1. *Recognition of Problems in the Lake*

Over the years, it has become increasingly apparent that although Florida succeeded in reclaiming much of the Everglades for human use, the natural environment has suffered as a result of these efforts. What remains of the natural Everglades is in a continuing state of decline. (*Joint Pretrial Stip.*, Attach. 5B ¶ 49). The

38. The rim canal, into which the canal waters are pumped, attracts species of birds that would generally be attracted to the canals. (*See id.*, 150:5-10). As noted, the rim canal is similar to the canals in other respects. (*See Trial Tr. Jan. 9, 2006*, 120:14-121:6; *Trial Tr. Jan. 10, 2006*, 149:14 21).

adverse situation is primarily attributable to the Everglades' diminished capacity to retain the huge volume of water that once pooled and sheet flowed across the landscape. (*Id.*). These waters are now either discharged in massive volumes through canal systems to tide, or are stored at unnaturally high levels in the Water Conservation Areas ("WCA[s]"). (*Id.*).

Many of the area's problems are now recognized as unanticipated consequences of the C&SF Project. (*Joint Pretrial Stip.*, Attach. 5B ¶ 49). The problems are exacerbated by the inescapable reality that people continue to move to South Florida at one of the highest rates in the nation. (*Id.*). The result is a currently non-sustainable system of urban, agricultural and natural environments in South Florida that exceeds the capacity of, or is hampered by, the existing system of water management. (*Id.*, ¶ 50).

The problems facing the Everglades have been examined in many studies conducted over the past 35 years, many of which have been funded by the SFWMD. (*See Trial Tr. Jan. 11, 2006*, 6:15-7:3). For example, in 1969, a United States Geological Survey report concluded that: (1) Lake Okeechobee was eutrophic; (2) the EAA was a principal source of nitrogen loadings to the Lake; (3) backpumped waters were very high in nitrogen, had high specific conductance, and had low turbidity; and (4) the most impacted parts of the Lake were the rim canal and the South Bay littoral zone. (*Joint Pretrial Stip.*, Attach. 5A ¶ 35).

Appendix D

A series of scientific studies subsequently conducted confirmed the conclusion that the Lake was undergoing a process of man-induced (anthropogenic) eutrophication and that backpumped EAA flood water contributed significantly to Lake eutrophication. (*See Plain. Ex. 111*, pp. 49-52). In 1976, the Florida Department of Administration, the DER, and the Central and Southern Florida Flood Control District participated in a report that ultimately recommended that: (1) backpumping from S-2, S-3, and S-4 and by private interests should be eliminated or reduced to the maximum degree feasible; (2) the EAA canals should be enlarged to enable the largest feasible amount of water now backpumped to be routed southward for storage; (3) as much of the backpumped water as feasible should be stored for recyle [sic] within the EAA; and (4) a detailed study of alternatives to backpumping by private interests and the S-4 pump station should be conducted. (*Plain. Ex. 111*, pp. 80-84). The study, however, did not recommend that backpumping be eliminated. (*See id.; Trial Tr. Jan. 17, 2006*, 51:21-52:1).

The State of Florida has declared the Lake to be impaired (not meeting its designated uses) "due to phosphorus, dissolved oxygen, iron, un-ionized ammonia, coliforms and chlorides." (*Plain. Ex. 20*, p. 8). Florida has also recognized that the health of the Lake's natural resources is threatened by three primary stressors: (1) excessive phosphorous loads; (2) harmful high and low water levels; and (3) the spread of exotic vegetation. (*Joint Pretrial Stip.*, Attach. 5B ¶ 31).

Appendix D

2. *Efforts to Restore Lake Okeechobee and the Everglades*

To combat the enormous problems facing Lake Okeechobee, the state and federal governments have gone to great lengths to restore the system. Many of the programs build upon each other. The following summarizes the major programs/actions upon which the Court heard testimony and received evidence.

a. SFWMD Duties

In 1972, the Florida legislature expanded the SFWMD's duties to include management, on a holistic basis, of all water resources throughout Central and South Florida. (*Trial Tr. Jan. 20, 2006*, 113:20-114:1). In keeping with the goal of protecting the environment, the SFWMD and other agencies have conducted extensive research to address the water quality problems of the Lake. (*Joint Pretrial Stip.*, Attach. 5B ¶ 47). Many scientists have been studying the Lake to ascertain the optimal manner of restoration, spending millions of dollars to examine not only the Lake but the interactions occurring within the entire ecosystem. (*Trial Tr. Jan. 11, 2006*, 6:17-7:25). Notwithstanding its efforts, however, the SFWMD has been the source of considerable criticism and has been forced to defend numerous lawsuits over the years.

Appendix D

b. Interim Action Plan and Temporary Operating Permit

In the late 1970s, environmental groups filed suit against DER, alleging that it had failed to require the SFWMD to obtain a pollution permit for the structures that were discharging water and pollutants into Lake Okeechobee. (*Trial Tr. Jan. 12, 2006*, 97:18-98:3). The parties eventually entered into a consent decree, pursuant to which DER issued a temporary operating permit to the SFWMD that required the development of interim actions to reduce nutrient impacts to the Lake. (*See id.*, 101:11-16; *Plain. Ex. 112*). The permit also required the development of a longer-range analysis of options for reducing pollution levels. (*See id.*).

One important consequence of the consent decree was the development of a modified backpumping schedule called the Interim Action Plan ("IAP"). (*See Trial Tr. Jan. 12, 2006*, 101:17-106:10; *Plain. Ex. 113*). The IAP established a point system to determine when backpumping for purposes other than water supply is appropriate. (*See Trial Tr. Jan. 12, 2006*, 104:10-105:4; *Plain. Ex. 113*). In other words, under the IAP, the SFWMD is permitted to backpump into the Lake from the S-2 and S-3 pump stations only under certain conditions.[39] (*Plain. Ex. 113*, Table 5).

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39. The requirements of the IAP do not apply to the S-4 pump station. (*Plain. Ex. 113; Trial Tr. Jan. 17, 2006*, 116:15-16; *Trial Tr. Feb 13, 2006*, 42:5-6).

Appendix D

One of the primary goals of the IAP was to move nutrient-rich waters south into the WCAs or out to tide rather than moving them north into the Lake. The IAP has successfully reduced the amount of water moving north into the Lake. At most, the S-2 and S-3 pumps now operate only a few days per year. (*Trial Tr. Feb. 10, 2006*, 105:20-21). There are estimates that the IAP has reduced the flows from the EAA to the Lake by 90 to 95 percent. (*Trial Tr. Jan. 10, 2006*, 138:15-19; *Trial Tr. Jan. 20, 2006*, 128:12-18). Today, the S-2, S-3, and S-4 pump stations, together, contribute no more than six percent of the total inflows to Lake Okeechobee (on a multi-year average). (*See Joint Pretrial Stip.*, Attach. 5B ¶ 29; *Trial Tr. Jan. 25, 2006*, 54:17-22, 66:4-8).

Plaintiffs, however, provided testimony that, over the years, backpumping has occurred even when the conditions specified in the IAP were not met (*i.e.*, when the point total was not high enough). (*See Trial Tr. Jan. 13, 2006*, 176:23-179:22, 181:13-21). Moreover, because the IAP does not apply to backpumping for water supply purposes, under certain circumstances, a significant amount of water could be backpumped outside the bounds of the IAP. (*Trial Tr. Jan. 12, 2006*, 105:14-16).

c. 1983 Operating Permit

In 1983, the DEP issued to the SFWMD an operating permit that placed limits on the amount of phosphorous and nitrogen that could be discharged from SFWMD structures into Lake Okeechobee. (*Plain. Ex.*

114). The permit also set deadlines for meeting the reduction requirements. (*See id.*). It specifically regulated discharges from 14 major inflow structures to the Lake. (*Joint Pretrial Stip.*, Attach. 5A ¶ 55). Importantly, the operating permit incorporated the backpumping criteria of the IAP. (*See Trial Tr. Jan. 18, 2006*, 7:8-15). The 1983 operating permit for the SFWMD was meant only to establish temporary goals and was scheduled to expire in 1988. (*See Trial Tr. Jan. 11, 2006*, 76:13-17; *Trial Tr. Jan. 12, 2006*, 125:13-126:8). The 1983 permit is still in effect. (*Trial Tr. Jan. 12, 2006*, 126:9-128:2; *Trial Tr. Jan. 25, 2006*, 110:24-111:1).

Herbert Zebuth summarized the SFWMD's compliance with the 1983 permit in a report that was entered into evidence. (*See Plain. Ex. 93*). His report was based on data provided by the SFWMD. (*Trial Tr. Jan. 12, 2006*, 61:4-6). The analysis, and Mr. Zebuth's testimony, indicate that the permit's nutrient targets have been continually exceeded throughout the years. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 24; *see also Plain. Exs. 45, 93*; *Trial Tr. Jan. 12, 2006*, 111:22-23, 116:8-20).

d. Surface Water and Improvement Act

In 1985 and 1986, the Lake experienced a massive algal bloom that attracted widespread public attention. (*See Trial Tr. Jan. 12, 2006*, 40:23-25). In response, Florida passed the Surface Water and Improvement ("SWIM") Act, which required development of a plan to improve the water quality of the Lake and other water bodies by 1988, and required compliance with a numeric

phosphorous reduction goal by a date certain. (*Id.*, 40:23-41:12). The stated legislative intent of the SWIM Act is as follows:

> The Legislature finds that the water quality of many of the surface waters of the state has been degraded, or is in danger of becoming degraded, and that the natural systems associated with many surface waters have been altered so that these surface waters no longer perform the important functions that they once performed. These functions include:
>
> > (a) Providing aesthetic and recreational pleasure for the people of the state;
> >
> > (b) Providing habitat for native plants, fish, and wildlife, including endangered and threatened species;
> >
> > (c) Providing safe drinking water to the growing population of the state; and
> >
> > (d) Attracting visitors and accruing other economic benefits.

Fla. Stat. § 373.451.

Appendix D

The SWIM Act mandates that each water management district "maintain a list that prioritizes water bodies of regional or statewide significance within the water management district." Fla. Stat. § 373.453(1)(a). The lists are to be reviewed and updated every five years. *Id.* The SWIM Act specifically requires that the SFWMD prioritize the restoration of Lake Okeechobee and its tributaries. Fla. Stat. § 373.453(1)(c)(1). Water management districts are authorized to develop surface water improvement and management plans for the water bodies within their district. Fla. Stat. § 373.453(2). Those plans should include, among other things, the identification of point and nonpoint sources of pollution to the water body and strategies for restoring and protecting the water body. *Id.*

The plan developed for Lake Okeechobee set a goal of a 40% reduction in phosphorous loading to the Lake (from the watershed) from the baseline levels that existed from 1973-1979. (*Joint Pretrial Stip.*, Attach. 5A ¶ 64).[40] From 1991-2000, an average of 433 metric tons of phosphorous entered the Lake annually. (*Def. Ex. 28*, p. 11; *see Trial Tr. Jan. 12, 2006*, 122:5-22). Accordingly, the 1997 SWIM Plan update reported that although the Plan had achieved phosphorus load reductions, the 40% reduction goal had not been achieved. (*Joint Pretrial Stip.*, Attach. 5A ¶ 67). Similarly, the 2002 SWIM Plan update found that phosphorous loading far exceeded

40. The SWIM Plan did not address nitrogen loading to the Lake. (*Joint Pretrial Stip.*, Attach. 5A ¶ 61).

the amount considered necessary to achieve a healthy Lake and found that it could take decades before the beneficial results of phosphorous loading reductions were realized. (*Joint Pretrial Stip.*, Attach. 5A ¶ 69).

e. 1988 Consent Decree and Everglades Forever Act

In 1988, the United States filed suit against the SFWMD and the State of Florida over activities that allowed pollutants to enter the Everglades. *See United States v. So. Florida Water Mgmt. Dist.*, Case No. 88-1886-Civ. Specifically, the suit concerned the SFWMD's movement of polluted waters to Everglades National Park. A consent decree reached in the 1988 suit resulted in the construction of stormwater treatment areas ("STA[s]") in the southernmost portion of the EAA (*Trial Tr. Jan. 13, 2006*, 92:22-93:4), and the construction of new pump stations approximately five miles north of the S-7 and S-8 pump stations for the purpose of pulling canal water into the STAs. (*Def. Exs. 1, 118*).

In the aftermath of the litigation, Florida passed the Everglades Forever Act.[41] *See* Fla. Stat. § 373.4592. The Everglades Forever Act mandates that a series of actions be taken to restore the Everglades. At trial, Defendants focused on the best management practices ("BMP") program established by the Act. The BMP program is a regulatory program meant to control the

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41. The Everglades Forever Act was initially known as the Everglades Protection Act. (*Trial Tr. Feb. 9, 2006*, 34:11-13).

release of pollutants before they enter navigable waters. (*Trial Tr. Feb. 9, 2006*, 37:12-22). The BMP program is considered a source control program. (*Id.*, 37:11-23). All landowners within the EAA who utilize the works of the district must apply for a BMP permit. (*Id.*, 34:8-25; Fla. Admin. Code r. 40E-63.110(1)).

Landowners may receive general, individual or master permits. General permits are issued under the program for smaller parcels of land. *See* Fla. Admin. Code r. 40E-63.120. To obtain an individual permit, an applicant must, among other things:

> (1) Submit and implement a BMP Plan which includes:
>
> > (a) A description of Best Management Practice implementation and operation;
> >
> > (b) A description of Best Management Practice rationale (Best Management Practice research can be used to supplement data where appropriate);
> >
> > (c) A consideration of the Best Management Practices [from a list] . . . and an explanation of why Best Management Practices not included in the BMP Plan are not suitable for implementation;

> (d) A fertilization and water management plan for each crop, combination of crops or farming units;
>
> (e) A water management system design plan, including a water budget, probable volume and timing of discharge, nutrient recovery rationale, field water management strategies, infrastructure descriptions, and inter- and intra-operation water routing;
>
> (f) A monitoring plan to verify Best Management Practice implementation, operation and effectiveness . . . ;
>
> (g) An education and training program for management and operation staff responsible for implementing and monitoring the approved BMP Plan;
>
> (h) A schedule for implementing the BMP Plan. . . .

Fla. Admin. Code r. 40E-63.136. Each permit has a five-year life (*see Trial Tr. Feb. 9, 2006*, 35:20-21), and is subject to modification. (*Id.*, 39:4-10).

Master permits are only issued to landowners who agree to oversee implementation of the permit for all of the landowners within an area. (*See id.*, 56:15-16).

Appendix D

Master permits must meet all the conditions that are required to obtain an individual permit. Fla. Admin. Code r. 40E-63.156(1)(a). In addition, "[t]he permittee [must] demonstrate sufficient legal and financial capability to carry out all acts necessary to implement the terms and conditions of the Master Permit, including the ability to take necessary enforcement action." Fla. Admin. Code r. 40E-63.156(1)(b).

The DEP has developed a list of best management practices that farmers may administer. (*See Trial Tr. Feb. 9, 2006*, 43:1-16). Each practice is assigned a point value and farmers must choose a combination of practices for which the associated point values total 25 points. (*See id.*). The theory behind the system is that farmers are able to choose BMPs that best suit their needs and are cost effective. (*See id.*, 43:12-44:6).

The goal of the BMP regulatory program is to reduce the total phosphorous loadings discharged from the EAA by a minimum of 25% annually. Fla. Admin. Code r. 40E-63.101(1). If the basin achieves certain reduction goals, farmers may receive tax relief. (*See id.*). If the basin does not achieve a goal, each farmer's compliance efforts is analyzed individually. (*See id.*). The program has resulted in, on average, an annual 50% reduction in phosphorous loading against the baseline. (*See Trial Tr. Feb. 9, 2006*, 52:11-15).

Appendix D

f. Total Maximum Daily Loads to Lake

Section 303(d) of the CWA mandates that each state submit a list of all impaired water bodies to the EPA and subsequently establish a TMDL for each impaired water body.[42] *See* 33 U.S.C. § 1313(d). In 1998, FWF and other parties sued the EPA in federal court over its failure to require Florida to set TMDLs for the State's water bodies (including Lake Okeechobee), as required under the CWA. (*Trial Tr. Jan. 26, 2006*, 58:24-59:22). In 1999, a consent decree was entered, pursuant to which the Florida legislature enacted the Watershed Restoration Act of 1999, Fla. Stat. § 403.067, and, later, the Lake Okeechobee Protection Act, Fla. Stat. § 373.4595. (*See id.*, 60:9-61:3).

The Watershed Restoration Act of 1999 ("WRA") requires the DEP to list, and prioritize, all bodies of water in the State for which "total maximum daily load assessments will be conducted." Fla. Stat. § 403.067(2). The statute lists methodologies pursuant to which the DEP "shall conduct a total maximum daily load assessment of the basin in which the water body or water body segment is located." Fla. Stat. § 403.067(3). "If the DEP determines, based on the total maximum daily load assessment . . . that water quality standards

42. The TMDL is based upon each water's assimilative capacity with respect to a given nutrient/pollutant (*i.e.*, the amount of the nutrient/pollutant that may enter the water without causing an adverse effect sufficiently severe to cause the water to become unfit for its designated use). (*See Trial Tr. Feb. 13, 2006*, 82:12-21).

are not being achieved and that technology-based effluent limitations and other pollution control programs . . . are not sufficient to result in attainment of applicable surface water quality standards," the water body must be added to a list of water bodies for which total maximum daily loads will be calculated. Fla. Stat. § 403.067(4). The list "must specify the particular pollutants causing the impairment and the concentration of those pollutants causing the impairment relative to the water quality standard." *Id.* The legislation further provides criteria and methodologies to be used in calculating the maximum daily loads. Fla. Stat. § 403.067(6).

The WRA imbues the DEP with a variety of tools with which to achieve the TMDLs. The DEP may "develop a basin management action plan that addresses some or all of the watersheds and basins tributary to the water body." Fla. Stat. § 403.067(7)(a)(1). The basin management action plan must include milestones for implementation of the plan and for water quality improvement, and must include a water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved. Fla. Stat. § 403.067(7)(a)(5). Moreover, the DEP may develop BMPs. Fla. Stat. § 403.067(7)(c). Finally, in implementing the TMDL, the DEP may utilize: (1) permitting and other existing regulatory programs; (2) nonregulatory and incentive-based programs; (3) other water quality management and restoration activities; (4) pollutant trading or other equitable economics-based agreements; (5) public works including

capital facilities; and/or (6) land acquisition. Fla. Stat. § 403.067(7)(b).

In 2001, pursuant to the WRA, the DEP adopted for Lake Okeechobee a TMDL for phosphorous of 140 metric tons. Fla. Admin. Code r. 62-304.700(1). Attainment of the TMDL is "calculated using a 5-year rolling average of the monthly loads calculated from measured flow and concentration values." *Id.* The TMDL is more stringent than the phosphorous goals established in the 1983 operating permit or the SWIM Plan. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 71).

In 2000, the Florida legislature passed the Lake Okeechobee Protection Act (the "LOPA"), Fla. Stat. § 373.4595, in order to achieve the 140 metric ton TMDL for phosphorous established under the WRA. The LOPA establishes a watershed-based approach to the problems facing the Lake, *see* Fla. Stat. § 373.4595(1)(d), and calls for the immediate implementation of the Lake Okeechobee Protection Program. Fla. Stat. § 373.4595(3). The Protection Program has several different components. Specifically, the LOPA requires the adoption of a formal Lake Okeechobee Protection Plan (the "LOPP") and annual reports, and implementation of the Lake Okeechobee Construction Project (the "LOCP"), a watershed phosphorous source control program, a research and water quality monitoring program, in-lake phosphorous management evaluation, and an exotic species control program. (*See Def. Ex. 28*, p. E-1)

Appendix D

The Final LOPP, prepared by the SFWMD, the DEP and the Florida Department of Agriculture and Consumer Services, was issued on January 1, 2004. The LOPP set a target date of 2015 to meet the phosphorous TMDL of 140 metric tons. (*Def. Ex. 28*, p. E-1). The total cost of implementing the LOPP is estimated to be approximately $ 322.2 million (in 2003 dollars).[43] (*Id.*, p. E-2).

The LOPP, which is to be re-evaluated every three years, anticipates achieving phosphorous reduction through the implementation of owner-implemented BMPs, funded cost-share BMPs and other phosphorous reduction projects. (*Def. Ex. 28*, p. 12). The LOPP also requires that the SFWMD submit an application to update the operating permit for all structures discharging into the Lake. (*Id.*, 3). As previously noted, the SFWMD is currently operating under the 1983 permit.

g. Comprehensive Everglades Restoration Project

Meanwhile, in 1992, Congress directed a restudy of the C&SF Project to address the problems associated with the Project. (*Trial Tr. Jan. 13, 2006*, 62:9-13). The restudy, which eventually became known as the Comprehensive Everglades Restoration Plan (the "CERP"), sought to establish a revised plan for addressing the problems of the Lake, the Everglades

43. The costs are to be borne by multiple stakeholders, including the SFWMD, landowners, and the State and federal governments. (*See Def. Ex. 28*, p. E-3).

and the remainder of the ecosystem. (*Trial Tr. Feb. 10, 2006*, 122:21-23). Although the CERP has water quality components, its primary focus is on water quantity (*i.e.*, ensuring that there is sufficient water available to provide for the population's needs). (*See id.*, 15:20-16:13). The CERP has no direct role in cleaning up Lake Okeechobee. (*Trial Tr. Feb. 17, 2006*, 16:5-10). Instead, the Project contemplates the construction of reservoirs to store water that might otherwise enter Lake Okeechobee, protecting the Lake from the impact of those waters.[44] (*See id.*, 46:24-47:2).

In 2000, Congress approved the CERP and authorized its implementation by Congress.[45] (*Trial Tr. Jan. 13, 2006*, 63:8-9). Congress directed restoration of the entire watershed. P.L. 106-541, § 601 (a)(5)(A) (WRDA 2000). The background for, and goals of, the CERP were summarized as follows:

> Adequately and reliably meeting water supply for all sectors is also a problem. Historically, most rainwater soaked into the ground in the region's vast wetlands. As south Florida developed, the canal network worked too effectively and drained too much water off the land too quickly. The result is that not enough

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44. One witness testified that the construction of an EAA reservoir is expected to eliminate the need to backpump for water supply purposes. (*See Trial Tr. March 2, 2006*, 24:16-19).

45. The restudy was actually completed in April 1999. (*See Trial Tr. Feb. 17, 2006*, 35:4-6).

> water is stored for all uses. Water shortages that occur today are expected to become more frequent without any changes to the water management system. Without the steps outlined in this Comprehensive Plan, conflicts over the allocation of water needed for natural, agricultural, and urban areas will only increase.
>
> * * *
>
> Overall, the recommended Comprehensive Plan will capture and store much of the water that is now lost to the ocean and gulf. This will provide enough water in the future for both the ecosystem, as well as urban and agricultural users. It will continue to provide the same level of flood protection as it does at present, if not more, for south Florida. The Comprehensive Plan is a system-wide solution for ecosystem restoration, water supply, and flood damage reduction. It is a necessary step towards a sustainable south Florida.

(*Def. Ex. 232*, Summary, iv, x).

The CERP was designed to build on the flexibility of adaptive management. (*Trial Tr. Feb. 10, 2006*, 123:2-9). It attempts to avoid past problems that resulted from changes to specific portions of the system causing unintended consequences to other parts of the system. (*Trial Tr. Jan. 11, 2006*, 75:6-19, 81:9-23; *see also Trial*

Tr. Jan. 17, 2006, 90:10-15). To avoid past mistakes, Congress established Restoration Coordination and Verification ("RECOVER"), a committee to review all of the CERP components that were developed. (*See Trial Tr. Jan. 13, 2006*, 120:16-23). RECOVER is charged with overseeing total integration of the projects. (*Trial Tr. Jan. 11, 2006*, 81:19-23; *Trial Tr. Feb. 17, 2006*, 51:6-19). There are approximately 66 individual projects contemplated by the CERP. (*Trial Tr. Jan. 20, 2006*, 151:20-22).

The CERP is being implemented through a State and federal partnership and has a projected shared cost of over $ 8.4 billion (in 1999 dollars). (*Joint Pretrial Stip.*, Attach. 5B ¶ 53). It involves the participation of 16 county governments, 122 municipalities, two tribal governments, numerous special districts, six metropolitan planning organizations, five regional planning councils, the SFWMD, five state environmental planning and regulatory agencies, and 11 federal agency managers. (*Id.*, ¶ 52).

There is no guarantee that the CERP projects will ever be implemented. (*See Trial Tr. Feb. 17, 2006*, 12:25-14:5). Plaintiffs' witness, Colonel Terry Rice, testified that many "authorizations that are provided by Congress for the Corps to implement are just simply never completed [] simply because . . . if all those things don't fall in place, it never happens." (*Id.*, 14:6-10).[46]

46. There is currently a backlog of $ 50 billion worth of projects that the Corps has been authorized to construct but upon which construction has not yet begun. (*See Trial Tr. Feb. 17, 2006*, 25:9-13, 26:18-23).

To date, very little progress has been made in constructing any of the CERP projects. (*See id.*, 17:1-14).

In 2005, Florida announced the implementation of Acceler8, a plan to expedite regional projects critical to restoration of the Everglades. Acceler8 contemplates that selected priority projects will move forward on an expedited basis. (*Trial Tr. Feb. 10, 2006*, 69:7-21; *Trial Tr. Feb. 17, 2006*, 17:17-22). There are eight projects being developed under the Acceler8 plan. (*See* https://my.sfwmd.gov/portal/page?_pageid=54,926206&_dad=portal&_schema=PORTAL&navpage=overview; *Def. Ex. 91* (marked but not admitted in evidence)). The goal of Acceler8 is to begin realizing some of the expected ecosystem benefits sooner rather than later. (*Trial Tr. Jan. 20, 2006*, 150:3-7). The State has authorized the SFWMD to issue $ 1.8 billion in bonds to support the Acceler8 plan.

It appears that part of the impetus for the implementation of the Acceler8 plan was the slow progress of the CERP projects. (*See Trial Tr. Feb. 17, 2006*, 17:17-22). There is no statute, however, that mandates completion of the Acceler8 projects. (*See id.*, 17:23-18:5).

3. *Purposes of the Lawsuit*

Throughout the course of the trial, it became apparent that Plaintiffs are not entirely certain of, and may not be in agreement on, the precise goals that they

hope to accomplish by requiring the SFWMD and/or its Director to obtain a permit for backpumping. Indeed, because the EPA does not currently issue permits for water transfers, there is no consensus on what type of permit the SFWMD and/or its Director should be required to seek, if one is required under the CWA. Accordingly, it is unclear what a NPDES permit would ultimately look like (*i.e.*, whether it would require treatment of the water, require backpumping to cease, contain a backpumping schedule, etc.). (*See, e.g., Trial Tr. Feb. 8, 2006*, 149:15-155:23; *Trial Tr. Feb. 15, 2006*, 82:2-92:13).

Notably, Plaintiffs' witness, Herbert Zebuth, indicated that he was unsure whether a permit would substantively change the responsibilities of the SFWMD with respect to backpumping. (*See, e.g., Trial Tr. Jan. 17, 2006*, 20:18-21, 28:4-18). In response to a question regarding the benefits of a NPDES permit, Mr. Zebuth stated:

> Well, I have my ideas why [NPDES permitting would be beneficial], and the reason I made that statement and the reasons are, number one, another layer of review, a Federal review that would be possibly above and beyond the political pressures that the State and Water Management District may find themselves in and, certainly, a State permit does not appear to carry much weight with the Corps of Engineers and maybe a Federal permit would, and I'm talking specifically about problems

with the implementation of the Interim Action Plan where I have been told by the Water Management District when they applied to me in writing to have the Interim Action Plan changed that the Corps said that they had to backpump when the canal stages reached 13 feet in spite of the fact that the Interim Action Plan specifically only allowed 6 points toward a total of 21 for a situation in which the canals reached 13 feet. So, a situation where one agency operating the system, I guess, believes their sovereign immunity does not require them to abide by State permits. So, an NPDES being a Federal permit, I think, might be more useful in getting that cooperation.

* * *

There are times when [the SFWMD] backpumped without the canals reaching 13 feet, but some of the other factors within that point system had generated sufficient points to reach 21. But on many, many occasions when the canal system reached 13 feet and they began backpumping, they did not have 21 points. With the Corps, let's see, not being subject to regulation by State regulatory agencies, it seems that a Federal permit, in my mind, might be more influential in allowing these operations that we're trying to achieve to be observed.

(*Id.*, 104:4-24, 109:1-8). It appears, according to Mr. Zebuth, that resolution of the suit in Plaintiffs' favor may do nothing more than provide a more effective mechanism for ensuring SFWMD compliance with its current obligations when it operates the S-2, S-3, and S-4 pumps in the future.

I. Western Projects

Defendants presented evidence regarding the existence of other water transfer projects throughout the country. Over the years, the Bureau of Reclamation[47] has designed many reclamation projects. (*See Trial Tr. Jan. 20, 2006*, 26:22-27:13). There are a multitude of such projects throughout the western United States, many, if not all, of which presumably involve water diversion. (*See Def. Ex. 280*). Defendants elicited testimony concerning some of the larger western projects.

The Central Utah Project was established by an act of Congress in 1956. (*Trial Tr. Jan. 20, 2006*, 30:9-12). The Central Utah Project includes several components that divert water from one basin to another. (*See id.*, 31:19-32:21). "[T]here are about 10 reservoirs involved with the Bonneville Unit [a component of the Central Utah Project], as well as many, many miles of canals and pipelines and tunnels to transport water from the Colorado riverside." (*Id.*, 33:4-7; *see also Def. Ex. 308*).

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47. The Bureau of Reclamation was chartered by an act of Congress in 1902. (*Trial Tr. Jan. 20, 2006*, 26:15-17).

Appendix D

A small pumping plant is one component of the project. (*Trial Tr. Jan. 20, 2006*, 33:11-13).

Another project is the Colorado Big Thompson Project, which transfers water from the west side to the east side of the Continental Divide. (*See Trial Tr. Jan. 20, 2006*, 40:8-41:4). That project was also authorized by Congress. (*Id.*, 43:18-24). At times, pumps are the primary means of diverting water from the western slope of the Continental Divide to the eastern slope. (*Id.*, 41:5-15). The primary purposes of the Colorado Big Thompson Project are to provide irrigation water, to supply municipal water and to generate hydropower. (*See id.*, 42:22-43:2). The project also provides incidental flood control, although flood control is not one of the stated purposes of the project. (*See id.*, 43:3-6).

The Fryingpan-Arkansas Project provides irrigation, municipal and industrial water, seeks to promote recreation activities, serves to sustain fish and wildlife, generates hydropower and provides flood control. (*Trial Tr. Jan. 20, 2006*, 49:2-7). The project transports water through a series of conveyances and utilizes pumps in doing so. (*See id.*, 48:7-22).

Other projects throughout the western United States also involve water conveyances, typically through tunnels and ditches. (*See Def. Ex. 276; see also Trial Tr. Jan. 20, 2006*, 49:22-24). Generally, the waters that are diverted have fewer constituents than do the canal waters being pumped into Lake Okeechobee. (*See Trial Tr. Jan. 20, 2006*, 53:5-54:4). No matter how pristine they

are, however, all waters contain at least a *de minimis* level of pollutants. (*See id.*, 67:15-68:2). One witness testified that there are "thousands and thousands" of water transfer projects throughout the country. (*Id.*, 62:2-6).

In short, the evidence demonstrates that the movement of water among bodies of water is not unique to South Florida. Water managers in other parts of the country are apparently concerned about the implications of a decision here from which it could be extrapolated or argued that similar transfers may require NPDES permits. (*Trial Tr. Jan. 20, 2006*, 68:9-20).

J. Description of the SFWMD

An issue that survived summary judgment is whether the SFWMD is entitled to sovereign immunity.[48] The undersigned therefore heard testimony pertaining to the SFWMD's operations, particularly with respect to the relationship of the SFWMD with the State of Florida.

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48. An order dated November 23, 2005 [D.E. 527] determined that the director of the SFWMD could be sued in his individual capacity under the doctrine first enunciated by the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908). However, the Order did not resolve the issue of the SFWMD's immunity, as the issue was addressed by way of summary judgment and the papers presented material facts in dispute.

Appendix D

The SFWMD is one of five water management districts in Florida. The districts were established to comprehensively manage the waters of the State as well as to implement the water resource policies of the State. Fla. Stat. §§ 373.016, 373.069. The SFWMD's jurisdiction is drawn along hydrologic, as opposed to political, boundaries. (*Joint Pretrial Stip.*, Attach. 5B ¶ 4).

The DEP delegates specific duties and responsibilities to the SFWMD. (*Trial Tr. Jan. 19, 2006*, 96:14-19). Additionally, and as noted, the SFWMD acts as the State sponsor of the C&SF Project. Fla. Stat. § 373.1501.

The SFWMD is governed by a nine member board, appointed by the governor of Florida, subject to confirmation by the Florida Senate. Fla. Stat. § 373.073(1)(a). The governor has the authority to remove any SFWMD officer from office. Fla. Stat. § 373.076(2). The executive director, who is appointed by the SFWMD governing board, is responsible for the day-to-day operations of the SFWMD and implements policy. (*Trial Tr. Jan. 19, 2006*, 112:5-9; *see also* Fla. Stat. § 373.079(4)(a)).

Because the SFWMD is listed as a "major component unit" of the State of Florida in comprehensive annual financial reports (*Trial Tr. Jan. 19, 2006*, 110:15-20; *Def. Ex. 104*), it must follow very specific budget and financial reporting requirements. (*Trial Tr. Jan. 19, 2006*, 94:5-13). As such, the SFWMD

must comply with rules set out by the Government Accounting Standards Board ("GASB"). (*Id.*, 104:13-25). Some agencies that are not "arms of the state," however, must also comply with GASB guidelines. (*Id.*).

The SFWMD budgeting process spans nine months. (*Trial Tr. Jan. 19, 2006*, 123:13-124:5). All interested parties (*i.e.*, the DEP, the SFWMD, governor and legislature) participate in the process. (*Id.*). The governor has line-item veto authority over the budget. (*Id.*, 107:5-6). The governor's office also reviews the SFWMD's revenue sources. (*See id.*, 132:17-20). The budget must also be submitted to the DEP and the legislature for review and comment. (*Id.*, 107:6-9). The DEP or the legislature may provide written objections or comments to the proposed budget, to which the SFWMD must respond. (*Id.*, 107:6-9, 116:2-7). In 2006, the SFWMD had a $ 1.1 billion budget. (*Id.*, 129:24-25).

The SFWMD receives general appropriations from the State, accounting for 25 to 30 percent of its budget. (*Trial Tr. Jan. 19, 2006*, 107:3-4). In addition to general appropriations, the State provides the SFWMD with special appropriations for specific projects, bond proceeds, gas tax revenues, license plate revenues, trust fund revenues, and other revenue streams. (*Id.*, 131:8-18). State funding may be withheld from the SFWMD if it fails to comply with certain state requirements. (*Id.*, 123:7-9).

Sources of non-state funding account for 70 to 75 percent of the SFWMD budget. (*See Trial Tr. Jan. 19,*

2006, 130:16-21). These sources include ad valorem taxing, federal grants, millage rates, and agricultural privilege taxes. (*See id.*). Ad valorem sources account for approximately 40 percent of the budget. (*Id.*). The SFWMD currently collects $ 440 million in ad valorem taxes annually, representing a sharp increase over the past seven years. (*Id.*, 146:6-13). Ad valorem tax rates are set by the governing board of the SFWMD (*id.*, 142:11-15), although there is a limit placed on the ad valorem taxes that the SFWMD may collect. (*Id.*, 135:5-10).

The SFWMD also imposes millage rate taxes (*see Trial Tr. Jan. 19, 2006*, 143:2-18) and agricultural privilege taxes. (*See id.*, 130:25-131:5). Similar to SFWMD ad valorem taxes, the counties in which the SFWMD operates collect taxes on behalf of the SFWMD and transfer the money directly to the SFWMD. (*Id.*). The SFWMD may also issue general obligation bonds and revenue bonds, although it has never issued general obligation bonds in the past. (*Id.*, 135:21-136:10).

The SFWMD can sue and be sued. (*Trial Tr. Jan. 19, 2006*, 151:11-13). It carries insurance for losses to its buildings, facilities and aircraft. (*Id.*, 136:13-17). Any funds collected from the policies are paid directly to the SFWMD. (*Id.*, 149:5-9). The SFWMD also has a self-insurance fund which is reserved to pay future claims in the areas of automobile liability, workers' compensation, and general liability. (*Id.*, 136:16:137:3).

Where large judgments have been rendered against the SFWMD in the past, as in inverse condemnation

suits, the SFWMD has satisfied the judgments using State trust funds to which it has access (*see Trial Tr. Jan. 19, 2006*, 131:19-132:1) and/or land act acquisition funds provided for in the SFWMD budget. (*Id.*, 139:3-140:6). If a judgment was sufficiently substantial, the SFWMD would be forced to declare a financial emergency and would have to request additional funds from the State. (*Id.*, 141:9-19).

III. CONCLUSIONS OF LAW

For Plaintiffs to prevail on their claims, the Court must answer the following two questions in the affirmative: (1) Does the CWA require that a water transfer between water bodies, where the transfer results in the addition of a pollutant to the receiving water body, comply with the NPDES permitting program; and (2) if so, are the canals meaningfully distinct from the Lake? The Court's analysis begins with the first question, a legal question of statutory interpretation that is case-dispositive.

A. Applicability of the NPDES Permitting Scheme

1. *Introduction*

Notwithstanding the enormous resources expended, and potential implications of the result, resolution of the initial legal question[49] before the Court rests primarily upon

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49. The issue of an appropriate remedy, if any, has been only briefly addressed for the most part, although U.S. Sugar has provided more extensive commentary in its proposed findings, filed on March 29, 2006. (*See* [D.E. 596]).

the proper interpretation of a few words of the CWA. Resolution of the matter, however, has been far from a simple exercise.

The CWA prohibits "the discharge of any pollutant by any person" unless the discharge is in compliance with the CWA.[50] 33 U.S.C. § 1311. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The SFWMD concedes that it does not currently have, nor has it ever had, a permit for the water transfers at issue, transfers that move water from the canals to the Lake (both being "navigable waters"), through point

50. "A "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). The SFWMD and its Director therefore qualify as persons under the CWA.

sources, the S-2, S-3, and S-4 pumps. This is because, according to the SFWMD, the transfers do not require NPDES permits.

Under the quoted statutory language, a permit is required where the following five elements are present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source. *Nat'l. Wildlife Fed'n. v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *Nat'l. Wildlife Fed'n. v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988). The undersigned must thus determine whether the SFWMD's activities *via* the S-2, S-3, and S-4 pumps *add* a pollutant *to navigable waters* (elements one, two and three).

2. *Defendants' Arguments*

Defendants offer two arguments in support of their position that transfers of water between navigable waters do not, as a matter of law, require NPDES permits where the waters are not subjected to any intervening uses. The first position, championed primarily by the SFWMD, is that the relevant statutory language unambiguously places such transfers outside the scope of the NPDES scheme. Defendants alternatively argue that the relevant provisions are ambiguous, and a holistic approach to the statute compels the conclusion that such water transfers are regulated by means other than the NPDES permitting program.

Appendix D

a. First Argument: The Statutory Language is Unambiguous.

As stated, the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The SFWMD concludes that permits are only required where an activity *adds* a pollutant *to navigable waters*. According to the argument, activities that move water from one navigable water to another do not result in any "*addition to navigable waters*" as they merely move water *between navigable waters*. The SFWMD contends that Plaintiffs, and some courts, have erred by focusing upon the word "addition" in a vacuum. It argues that the Court may not ignore *what the addition is "to."*

As an analogy, Defendants proffer a hypothetical law that bans the addition of wine to the United States. The ban would undoubtedly apply to the importation of wine from, for example, France or Italy. However, it would have no effect upon the movement of wine from California to Florida, as movement between states would not result in the addition of any wine to the United States as a whole.

Similarly, the SFWMD argues that while the CWA prohibits the addition of pollutants from the outside world to navigable waters, it does not prohibit transfers of pollutants between waters as the transfers do not result in a pollutant being added to the unit of *navigable waters of the United States* (although they may result in the addition of a pollutant to "*a* navigable water of

the United States"). The SFWMD maintains that if Congress had intended the statute to cover transfers between navigable waters, Congress would have required NPDES permits for the addition of a pollutant to "*any* navigable water" of the United States, or would have utilized similar language.

b. Second Argument: Because the Statute is Ambiguous, the Court Should Adopt a Holistic Approach to its Interpretation and/or Defer to the EPA Interpretation.

In the alternative, Defendants argue that the statutory provisions prohibiting discharges of pollutants without a permit are ambiguous. They urge the Court to adopt a "holistic" approach to the statute. Similarly, Defendants ask that the Court defer to the holistic interpretation of the statute undertaken by the EPA. Because the positions of Defendants and the EPA are essentially identical, the undersigned undertakes a detailed description of the rationales offered in support of the EPA's recently-issued "National Pollution Discharge Elimination System (NPDES) Water Transfers Proposed Rule" ("Proposed Rule").[51] *See* 71

51. The EPA had previously drafted a document entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" ("Agency Interpretation") on August 5, 2005. (*See United States' Motion for Summary Judgment* [D.E. 369], Ex. 1). The Proposed Rule adopts the position taken by the EPA in its Agency Interpretation. In a recent Notice filed with the Court, the EPA advises that it

(Cont'd)

Fed. Reg. 32887. If adopted, the Proposed Rule would amend the CWA regulations. *See id.* at 32889.

The Proposed Rule explicitly excludes water transfers from regulation under the NPDES permitting program. 71 Fed. Reg. 32887. It defines "water transfer" as "an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use." 71 Fed. Reg. 32889. The EPA cites the statutory language and structure, as well as the legislative history of the CWA, in support of the Proposed Rule.

The Proposed Rule espouses a "holistic" approach to interpreting the statute. *See id.* ("Looking at the statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources."). The EPA observes that, in enacting the CWA, Congress explicitly stated it did not intend to encroach upon the states' prerogatives with respect to the development and use of land and water resources. *See id.* at 32890 (citing 33 U.S.C. § 1251(b)). Likewise, the Proposed Rule emphasizes that Congress specifically provided that the CWA should not interfere with each state's ability to allocate quantities of water

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(Cont'd)

expects to take final action on the Proposed Rule by the spring of 2007. (*See* [D.E. 635]). This Order focuses on the Proposed Rule, as opposed to the Agency Interpretation.

within its jurisdiction. *See id.* (citing 33 U.S.C. § 1251(g)). The EPA states that

> [w]ater transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that, absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers.

Id.

The EPA also finds it relevant that, although the statute does not specifically speak to whether water transfers are subject to the NPDES permitting scheme, the only reference in the statute to flow diversion activities is in a section that addresses nonpoint sources of pollution. Pursuant to 33 U.S.C. § 1314(f), Congress instructed the EPA to develop information relating to the control of pollution resulting from "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." Although, as recognized in the Proposed Rule, the provision does not *exclusively*

address nonpoint sources, it is *primarily concerned* with nonpoint sources of pollution. *See* 71 Fed. Reg. 32890. The EPA concludes that when the statute is read in conjunction with the other provisions pertaining to the states' authority over water management, it is apparent that "Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution." *Id.*

The EPA justifies its Proposed Rule by resort to "the overall structure of the statute." *Id.* at 32891.

> In several important ways, water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from an industrial, commercial or municipal operation. Rather than discharge effluent, water transfers release one water of the U.S. into another.
>
> The operators of water control facilities are generally not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through point and nonpoint sources located far from those facilities and beyond control of the project

> operators. Congress generally intended that pollutants be controlled at the source whenever possible. *See* S. Rep. No. 92-414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharge of pollutants be controlled at the source"). The pollutants in transferred waters are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. . . . Congress acknowledged this when it directed Federal agencies to co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

Id.

The EPA also cites to the legislative history of the CWA in support of its position. It notes that the legislature sought to "to insure that State [water] allocation systems are not subverted." *Id.* (citing 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978)) (citation omitted). Moreover, in addressing 33 U.S.C. § 1314(f), the provision pertaining to flow diversion, the House Committee Report stated that it expected the EPA to be "diligent in [the] gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods

for control of pollution from such nonpoint sources as . . . *natural and manmade changes in the normal flow of surface and ground waters.*" *Id.* (citing H.R. Rep. No. 92-911, at 109 (1972)) (emphasis added).

Finally, the Proposed Rule cites a House Committee Report statement that:

> [I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system.

Id. (citing H.R. Rep. No. 92-911, at 96 (1972)).

The parties do not dispute that, if accepted, the Proposed Rule, and the EPA's rationale in support thereof, should result in the denial of the relief Plaintiffs seek.

Appendix D

3. *Plaintiffs' Arguments*

Plaintiffs maintain that the CWA unambiguously prohibits any addition of a pollutant to navigable waters without a permit. Theirs is a straightforward proposition. They argue that an "addition" of a pollutant takes place whenever a pollutant is added to a navigable water from anywhere outside of the receiving body of water, *including from another water body*. According to Plaintiffs, Defendants essentially ask the Court to draft an exception into the statute where Congress has not done so.

As Plaintiffs do not find any ambiguity in the statutory prohibition of *any addition* of *any pollutant* without a NPDES permit, Plaintiffs find Defendants' "holistic" arguments to be largely irrelevant. In other words, Plaintiffs argue that Congress has specifically and unambiguously mandated that certain activities be subject to the NPDES permitting scheme. While Congress certainly espoused other programs and policies in enacting the CWA, none of these other considerations can overcome the clear language of the statute. Moreover, Plaintiffs identify other provisions in the statute suggesting that Congress intended to control pollution and restore the nation's waters to the maximum extent possible. *See, e.g.*, 33 U.S.C. § 1251(a)(1) ("[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.").

Appendix D

4. *Relevant Case Law*

Before embarking upon a statutory analysis, it is both necessary and helpful to examine the manner in which other courts have addressed similar issues in the past. Unfortunately, no consensus has been reached among courts that have addressed these issues.

a. The S-9 Decision

Any survey of the law must necessarily begin with the Supreme Court's pronouncement in the *S-9 Case*. *See So. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In the *S-9 Case*, the Supreme Court considered the question, nearly identical to the one considered here,[52] of whether the SFWMD was required to obtain a NPDES permit for its water transfer activities. As noted, the S-2, S-3, and S-4 are not the only pumps operated by the SFWMD. The Supreme Court case concerned the SFWMD operation of the S-9 pump station.

The *S-9 Case* more particularly involved the pumping of canal water from the C-11 Canal[53] into a water conservation area known as "WCA-3." *Id.* at 100. The pumping activities served to maintain the water table in WCA-3 at a level significantly higher than the

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52. Indeed, the case was brought by FOE and Miccosukee, two of the Plaintiffs here.

53. The area lies to the south of Lake Okeechobee.

water level in the lands drained by the C-11 canal to the east. *Id.* Accordingly, "[a]bsent human intervention, that water would simply flow back east, where it would rejoin the waters of the canal and flood the populated areas of the C-11 basin." *Id.* at 100-01. Water was prevented from flooding the populated areas within the C-11 basin by levees that separated WCA-3 from the remainder of the basin. *Id.* at 101.

The *S-9 Case* came before the Court after the district court granted the plaintiffs' motion for summary judgment against the SFWMD, holding that the discharges required a NPDES permit. *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, Case No. 98-6056-Civ, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999). The district court's decision was affirmed by the Eleventh Circuit. *See Miccosukee Tribe of Indians of Florida v. So. Florida Water Mgmt. Dist.*, 280 F.3d 1365 (11th Cir. 2002).

In vacating the decision, the Court held that the water transfer activities only required a NPDES permit if they transferred water (and pollutants) from one body of water to another *meaningfully distinct* body of water. Alternatively stated, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)). The Court found that the district court had prematurely concluded that the C-11 Canal was "meaningfully distinct" from the WCA-3.

Appendix D

The Court specifically held that the record contained evidence that: (1) because of the porosity of the soil, especially in the absence of the levees, water would flow easily between ground and surface waters; (2) the levees would continually leak, allowing for "significant mingling" of the waters in question; and (3) if the pump station was shut down, flooding would occur and the waters could, over time, essentially become one body of water. *See id.* at 110-11. Having found that the record was not sufficiently developed to make a determination as to whether the bodies of water were "meaningfully distinct," the Court declined to adopt a standard by which courts should make the determination. *See id.* at 111. Accordingly, it expressed no opinion on the accuracy of the district court's statement that a permit is required whenever a pollutant would not enter the receiving body of water but for the actions of the point source. *See id.*

In considering the case, the Court addressed two legal arguments that are relevant to the present dispute. First, the Court rejected the argument that NPDES permits are not required where the entity that controls the point source does not add any pollutant to the water. It held that the CWA definition of point source "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters, which are, in turn, defined as the waters of the United States." *Id.* at 105 (internal quotations and citation omitted).

Next, and notwithstanding the fact that it had not granted certiorari on the issue, the Court briefly

addressed the "unitary waters" argument that Defendants also assert here. The Court ultimately declined to resolve the question as it had not been previously raised by the parties. However, the Court did not, at first glance, view the "unitary waters" theory favorably. It noted that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id.* at 107.

One problem identified by the Court was that

> under the Act, a State may set individualized ambient water quality standards by taking into consideration "the designated uses of the navigable waters involved." 33 U.S.C. § 1313(c)(2)(A). Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body. § 1313(d). This approach suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.

Id. The Court further opined that:

> 40 CFR § 122.45(g)(4) (2003) allows an industrial water user to obtain "intake credit"

> for pollutants present in water that it withdraws from navigable waters. When the permit holder discharges the water after use, it does not have to remove pollutants that were in the water before it was withdrawn. There is a caveat, however: EPA extends such credit "only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made." The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times.

Id. at 107-08.

It is thus clear that the Court cast aspersions on the "unitary waters" theory. It is not clear, however, whether the theory was presented to the Court in the same light as it has been presented here.[54]

b. Other Relevant Case Law

Because the Supreme Court did not reach the issue of whether the transfer of one navigable water to

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54. In any event, "before relying on a formulation of law in a prior opinion, we [the courts] must determine whether it was holding or dictum. We must make that inquiry even when the prior court was the Supreme Court. If a rule was declared only in dictum, the question remains undecided, and we have a constitutional duty to make our own determination of the answer." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1282 (2006).

another navigable water (where the water that is being transferred contains a pollutant) constitutes the "addition" of a pollutant, the parties have directed the Court to decisions of the courts of appeals in support of their arguments. Defendants ask the Court to follow the reasoning set forth in *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *Nat'l. Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (4th Cir. 1988), in which the courts found that the activities in question did not require NPDES permits. Conversely, Plaintiffs rely upon the more recent holdings in *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"), *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*"), and *Miccosukee Tribe of Indians v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002),[55] in which courts found that the transfers between navigable waters required permits.

The circuit court opinions have largely been presented as being inconsistent with one another. And yet while the courts may have used inconsistent language in reaching their conclusions, the cases are also distinguishable from one another on their facts. *Gorsuch* involved a dam that released water from a reservoir to a downstream water. Similarly, *Consumers*

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55. As already mentioned, the decision was vacated by the Supreme Court in the *S-9 Case*.

Power involved a hydroelectric facility that withdrew water and later released it into the same body of water from which the water was initially withdrawn. The cases Plaintiffs rely upon, *Dubois* and *Catskill I* and *II*, involved water transfers from one body of water to other, clearly distinct and wholly separate bodies of water. Thus, the circuit court holdings are not in direct conflict with each other and are certainly reconcilable.

The Gorsuch holding was based largely upon the court's deference to the EPA position that dams were not subject to the NPDES permitting program. *See Gorsuch*, 693 F.2d at 166-70. The court further deferred to the EPA position that low dissolved oxygen and supersaturation, which characterized the released water, were not "pollutants" within the meaning of the CWA. *See id.* at 174. The analysis is not pertinent to the question before the Court.

Of importance to this case is the following position of the EPA, which *was* adopted by the *Gorsuch* court:

> [A]ddition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. In its view, the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river).

Id. at 175. To the extent that the court held that a source must introduce a pollutant into the waters of the United States to be considered a "point source," that position was rejected by the Supreme Court in the *S-9 Case*. However, the holding remains relevant to the extent that it found that the movement of a pollutant between navigable waters does not constitute an "addition" to the receiving water.

In *Consumers Power*, pumps moved water from Lake Michigan into a manmade reservoir. *Consumers Power*, 862 F.2d at 581. The water was subsequently discharged into the lake. *Id.* The discharged waters contained, among other things, fish that had died as a result of the pumping process. *Id.* at 583. There was no dispute that the dead fish were considered pollutants under the CWA. *Id.* In rejecting the plaintiff's position that the activity required a permit, the court held that

> [f]or the Ludington facility, the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added. EPA's § 402 treatment of the Ludington facility's wastewater, far from evincing irrational or arbitrary agency behavior, represents a reasonable distinction between those pollutants already in the water moved and transformed by the essential operation of a hydroelectric power dam and those waste products "added" to the water by tangential processes in generating electricity.

Id. at 586.

Appendix D

In *Dubois*, the First Circuit was required to determine whether snowmaking activities that withdrew water from both the Pemigewasset River and Loon Pond, and ultimately deposited all of the waters into Loon Pond, required a NPDES permit. *Dubois*, 102 F.3d at 1275. Although there was some factual dispute as to whether the process introduced new pollutants into the water, *see id.* at 1296 n. 29, it was clear that, at a minimum, the discharged water included pollutants that were initially present in the Pemigewasset River. *See id.*

The court began its analysis by noting that "[t]he most important component of the [CWA] is the requirement that an NPDES permit be obtained." *Id.* at 1294 (citing *United States v. Commonwealth of Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983); 33 U.S.C. § 1342(1994)). *Dubois* explicitly rejected the district court's reasoning that "the intake water from the East Branch of the Pemigewasset River and the water in Loon Pond are all part of a singular entity, the waters of the United States, [meaning that] that the bodies of water are not to be considered individually in this context." *Id.* at 1296 (internal quotations and citation omitted).

Bearing directly upon the question presented here, the First Circuit found that there was nothing in the CWA evidencing a congressional intent to distinguish between unrelated, but hydrologically connected, bodies of water. *Id.* at 1298. The court distinguished the case from *Gorsuch* (where a dam accumulated "the same" water) and *Consumers Power* (where a facility stored

water from one source in a different place). *Id.* at 1299. The court concluded:

> We hold that the Pemigewasset River and Loon Pond are two distinct "waters of the United States," and that the proposed transfer of water from one to the other constitutes an "addition." Where, as is undisputed here, the discharge is through a point source and the intake water contains pollutants, an NPDES permit is required. The Forest Service's determination to the contrary was arbitrary and capricious and not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

Id.

Finally, the Second Circuit issued two decisions in the *Catskill* case. The first decision was issued prior to the Supreme Court ruling in the *S-9 Case*. After the Supreme Court rendered its decision, the Second Circuit reconsidered its holding in *Catskill II*. *Catskill II* upheld the court's original decision that the NPDES permitting program was applicable to transfers between two bodies of water.

In reaffirming its prior decision, the Second Circuit addressed, and rejected, many of the same arguments presented here by Defendants. Indeed, the Second Circuit received *amicus curiae* briefs, as the Court did here, from western states that were concerned about

the implications of the court's decision on their ability to allocate water. Unimpressed by New York City's "holistic" arguments, the court found as follows:

> In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for interbasin transfers of pollutants, these "holistic" arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for "the discharge of any pollutant," 33 U.S.C. § 1311(a), which is defined as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). It is the meaning of the word "addition" upon which the outcome of *Catskills I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context. In *Catskills I*, we pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. 273 F.3d at 494. The CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters. The City and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.

Catskill II, 451 F.3d at 84-85.

5. *Analysis*

Having reviewed the parties' arguments and surveyed the most relevant case law, the Court now turns to its own analysis. The legal question before the Court is primarily one of statutory construction. "Statutory construction . . . is a holistic endeavor." *Smith v. United States*, 508 U.S. 223, 233 (1993) (quoting *United Sav. Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). Accordingly, the Supreme Court has long held that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *United States v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850); *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n. 5 (1998); *see also United States Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (noting that the maxim has been quoted "in more than a dozen cases"). Thus,

> [w]hen interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.

Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (internal quotations and citations omitted).

Therefore, and notwithstanding the arguments presented by the parties, the Court is not faced with the choice of whether to take a narrow versus a holistic view of the statute. Indeed, it would be error to employ anything but a holistic approach, as individual statutory provisions are not meant to be read in a vacuum. But even when taking a "holistic approach," a court must begin its analysis with the language of the statute. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (*citing Bailey v. United States*, 516 U.S. 137, 144 (1995)). More specifically, because Plaintiffs assert that the SFWMD's activities require a NPDES permit, the Court begins with the statutory provisions pertaining to NPDES permits.

The CWA prohibits "the discharge of any pollutant by any person" unless the discharge is in compliance with the CWA. 33 U.S.C. § 1311. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Finally, "navigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The word "addition" is not defined in the CWA.

When a term is not defined by statute, courts must construe the term "in accordance with its ordinary or natural meaning." *S.D. Warren Co. v. Maine Bd. of*

Envtl. Prot., 126 S. Ct. 1843 (2006) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). "Addition" is defined as the "joining of one thing to another." Webster's Third International Dictionary Unabridged, p. 24 (1993). Although the EPA states "that it is reasonable to interpret 'addition' as not generally including the mere transfer of waters from one water of the U.S. to another," it offers no sound explanation in support of its strained definition of the term. 71 Fed. Reg. 32891. Notwithstanding Defendants' protestations to the contrary, it is evident that "addition . . . to the waters of the United States" contemplates an addition from anywhere outside of the receiving water, including from another body of water. *See S-9 Case*, 280 F.3d at 1368 ("[I]n determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water."); *Catskill II*, 451 F.3d at 84 (finding that defendants' arguments "simply overlook [the CWA's] plain language").

Far from being inconsistent with the "structure" of the CWA, requiring permits for backpumping is consistent with the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Indeed, Congress set the ambitious and as yet unachieved goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1). Courts have recognized that the NPDES permitting scheme represents the most important tool in achieving the goal of cleaning up the

nation's waters. *Am. Iron and Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997) ("The centerpiece of the CWA is the NPDES permitting program."); *Dubois*, 102 F.3d at 1294 ("The most important component of the [CWA] is the requirement that an NPDES permit be obtained."); *United States v. Com. of Puerto Rico*, 721 F.2d at 834 ("The linchpin of the [CWA] is the NPDES permit process.").

The discussion in *Gorsuch* of the primacy of the NPDES program is instructive:

> There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution. Prior to 1972, federal water pollution law had required the states, under EPA oversight, to develop water quality standards and then limit industrial and municipal discharges so as to meet those standards. This system proved inadequate. It was costly, slow, and complicated to determine the effluent limits needed to maintain water quality. Many states did not set effluent limits and enforcement was all but nonexistent. The 1972 Act made technology-based effluent limits, rather than water quality standards, "the basis of pollution prevention and elimination" because they were "the best available mechanism to control water pollution."

Gorsuch, 693 F.2d at 175-76 (footnotes and internal citations omitted).

Moreover, as both the Supreme Court and First Circuit noted, a holding that the NPDES program does not apply to water transfers would result in a scheme where a person could pump the most polluted waters into the most pristine waters without a NPDES permit. *See S-9 Case*, 541 U.S. at 106; *Dubois*, 102 F.3d at 1297. Defendants presented evidence that other programs established by the states and/or the CWA would prevent such an absurd result. However, evidence introduced at trial called into question the effectiveness of many alternative regulatory regimes, and, as noted, Congress apparently intended that the NPDES program serve as its primary tool whenever possible.

The undersigned does not suggest that the scope of the NPDES permitting scheme may be settled by reference to general policies and the importance of the NPDES program within the CWA scheme. However, Defendants have suggested that Plaintiffs' and other courts' natural reading of the "addition to navigable waters" provision is at odds with the structure of the statute. Hopefully, the preceding analysis demonstrates that far from being inconsistent with the structure of the CWA, there are many aspects of the CWA that wholeheartedly support Plaintiffs' interpretation. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived."); *Shanty Town Assoc. Ltd. P'ship. v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) ("[T]he [FWCPA's] legislative history makes clear that this omission [of direct federal

regulation of nonpoint source pollution] was due not to Congress' concern for state autonomy, but . . . to its recognition that the control of nonpoint source pollution was so dependent on . . . site-specific factors. . . that its uniform federal regulation was virtually impossible.").

Having found that the relevant statutory language contemplates the permitting of transfers between navigable waters, and that the statute and its legislative history provide a considerable amount of support for that conclusion, the undersigned turns to whether the conclusion is clearly inconsistent with the structure of the CWA (*i.e.*, whether a "holistic" approach compels a different conclusion).

a. Federalism Concerns

Defendants' primary argument is that Congress clearly intended that the CWA not encroach upon the states' ability to allocate water within their jurisdictions. It is beyond dispute that the CWA has, to the maximum extent possible, left water allocation decisions to the states. For example, the CWA states that

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any

> State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g). Congress also emphasized that the CWA should not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2).

Senator Malcolm Wallop, who sponsored the section 101(g) amendment (often referred to as the "Wallop Amendment"), described the purpose of the amendment as follows:

> The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations. This amendment is an attempt to recognize the historic allocation rights contained in State constitutions. It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other

> purposes. It does not interfere with the legitimate purposes for which the act was designed.

3 Leg. Hist. 532 (Senate Debate, Dec. 15, 1977).

Defendants concede that the Wallop Amendment does not specifically speak to whether backpumping and similar practices are covered under the NPDES permitting scheme. However, they argue that because backpumping and like activities are part and parcel of a state's ability to allocate quantities of water within its jurisdiction, it is unlikely that Congress intended to subject such activities to the NPDES permitting program. Alternatively stated, Defendants contend that requiring permits will not merely have an incidental effect upon states' allocation prerogatives, but will effectively eliminate states' control over their own waters.

The Supreme Court has emphasized that "[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; *they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.*" *PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology*, 511 U.S. 700, 720 (2004) (emphasis added). *See also United States v. Akers*, 785 F.2d 814, 821 (9th Cir. 1986) ("A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment

are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process."); *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583, 589 (D. Colo. 1983) ("[C]ongress did not intend to limit § 404's scope where it might affect state water-rights law when it enacted § 101(g).").

In the *S-9 Case*, the parties argued that "to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies." *S-9 Case*, 541 U.S. at 108. The Supreme Court did not dismiss the argument out of hand, instead stating that

> [i]t may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs.

Id. (citations omitted).

The Supreme Court thus suggested that in order to prevail on their federalism argument, Defendants must (1) demonstrate that the water transfers are allocative in nature; and (2) show that permitting the transfers would prohibitively raise states' costs of water distribution. Here, Defendants have failed to demonstrate either element.

At least since the implementation of the IAP, the vast majority of backpumping has been for flood control purposes. Backpumping typically occurs, as a matter of course, whenever the water levels in the canals reach a pre-determined elevation. Indeed, the SFWMD only backpumps for water supply purposes under very limited circumstances. Pumping massive quantities of water into the Lake after heavy rains is not the type of activity contemplated by the Wallop Amendment.

This is not to suggest that backpumping has *no impact* on the State's allocation decisions. Water that reaches Lake Okeechobee may later be used to supply water for drinking or irrigation. Nevertheless, the Supreme Court and Congress have made clear that such incidental effects are both anticipated and acceptable aspects of the NPDES permitting program. *See PUD No. 1 of Jefferson County*, 511 U.S. at 520; 3 Leg. Hist. 532 (Senate Debate, Dec. 15, 1977).

The undersigned is mindful that Defendants, particularly the United States, ask that the broader implications of any decision here be carefully considered. Thus, although backpumping through the S-2, S-3, and

S-4 pump stations may not have a significant impact on Florida's water allocation activities, permitting analogous activities could potentially cripple water management activities throughout the country, particularly in the West. While it may not be appropriate to turn a blind eye to any broader implications this decision may have, this case must be decided based upon the particular controversy at issue.[56] The evidence concerning water transfers in western states demonstrates that there are thousands of water transfers throughout the United States. It does not demonstrate, however, that those activities are essentially identical to the SFWMD's backpumping activities. It would be inappropriate to determine whether backpumping requires a permit by resorting to the potential impact of such a decision on other water transfers — water transfers about which the Court neither has a complete record nor has any authority to opine.[57]

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56. As Second Circuit Judge Pierre N. Leval noted in his recent article, *Judging Under the Constitution: Dicta About Dicta*, "[t]he constitutional function of the courts is to adjudicate — to decide cases. The Constitution does not explicitly grant to the courts the power to make law." 81 N.Y.U. L. Rev. at 1259. That right is clearly reserved to the legislative branch, and the decision reached here by no means applies to or binds other parties other than those present.

57. Many of the considerations that counsel against the issuance of advisory opinions also counsel against the Court emphasizing the potential effects of its statutory interpretation upon water transfers in other parts of the country, transfers

(Cont'd)

Even if the Court were to find that the SFWMD's backpumping implicated water allocation considerations that are the focus of sections 101(g) and 510(2) and/or looked beyond the transfers at issue here, the record does not support Defendants' implicit argument that subjecting water transfers to NPDES permitting would prohibitively raise a state's costs of water distribution. The NPDES permitting program does not require the total elimination of all pollutant discharges to navigable waters. The Court wholeheartedly agrees with the Second Circuit's finding that "the flexibility built into the CWA and the NPDES permit scheme . . . will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." *Catskill II*, 451 F.3d at 85 (footnote omitted); *see also id.* at 87 ("While we recognize the incremental administrative burden our interpretation entails, we have little doubt that it nevertheless permits the City to deliver drinking water

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(Cont'd)

involving variables that are not present here. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961) ("Such opinions [advisory opinions], such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests, we have consistently refused to give.") (citations omitted). Nothing in the Court's decision will preclude parties who represent other states' water interests from pursuing their day in court.

to its citizens while furthering the CWA's goal to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'") (citation omitted). In support of its conclusion, the Second Circuit engaged in a detailed and well-reasoned discussion of the flexibility that is part and parcel of the NPDES permitting scheme. *See id.* at 85-86.

Any argument concerning the prohibitive costs of permitting water transfers is further undermined by the fact that other states, such as Pennsylvania, subject analogous water transfers to NPDES permitting. *See S-9 Case*, 541 U.S. at 109. Defendants have not presented any evidence as to why the water transfers in Pennsylvania are more amenable to permitting than are the water transfers in Florida or other states.

The states' primacy in allocating water represents one of many goals espoused by the CWA. Another policy of the CWA is the reduction of pollution in the nation's waters through the NPDES permitting process. The two goals are neither inconsistent nor in conflict here.

b. The Statute Does Not Contemplate that Pumps are Nonpoint Sources.

Defendants argue that flow diversion facilities such as the pump stations are generally considered to be nonpoint sources under the CWA. Again, the CWA requires the EPA to issue information pertaining "to processes, procedures, and methods to control pollution resulting from changes in the movement, flow, or

circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or *flow diversion facilities*." 33 U.S.C. § 1314(f)(2)(F) (emphasis added). The provision is found in a section of the CWA that concerns nonpoint sources of pollution. *See* 33 U.S.C. § 1314(f); *S-9 Case*, 541 U.S. at 106.

In enacting section 1314(f)(2)(F), Congress implicitly recognized that many flow diversion facilities would not constitute "point sources" under the CWA. Therefore, these facilities are not subject to the NPDES permitting program. *See Gorsuch*, 862 F.2d at 587 ("Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program."). Indeed, it would defy logic to conclude that Congress included flow diversion facilities in a section of the CWA addressing nonpoint sources if all flow diversion facilities are also to be considered point sources of pollution under the CWA.

Plaintiffs, however, do not contend that all flow diversion facilities must receive a NPDES permit, but merely that where a flow diversion facility transfers water from one body of water to another, it is a point source that requires a NPDES permit. The Supreme Court has observed that "§ 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *S-9 Case*, 541 U.S. at 106. The

undersigned fully concurs with the position taken by the EPA in *Gorsuch*, that section 1314(f)(2)(F)

> reflects congressional understanding that some dam-induced water quality problems are nonpoint source pollution (thus it would be improper to treat all dam-induced water problems as point source pollution), but does not indicate which dam-caused problems are nonpoint pollution (thus, the section does not preclude a finding that any particular pollution problem involves a point source of pollutants).

Gorsuch, 693 F.2d at 169.

Some, if not most, flow diversion facilities will result in pollution problems that will only be addressed by nonpoint source programs. The conclusion, however, does not suggest that other flow diversion facilities, such as the SFWMD pump stations, are not to be regulated as point sources under the NPDES program.

c. Deference to EPA

The EPA's recently-issued Proposed Rule seeks to clarify that transfers between navigable waters, such as backpumping, are not subject to NPDES permitting. Congress has charged the EPA with administering the permit program (although states may also administer NPDES programs so long as they comply with certain conditions). *See* 33 U.S.C. § 1342. Thus, Defendants ask that the Court defer to the EPA position.

The parties dispute the precise level of deference that the Court should give to the EPA interpretation. Defendants contend that, even if it is not entitled to full *Chevron* deference, the Proposed Rule is entitled to more deference than is the earlier Agency Interpretation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001). Whether the Court affords the level of deference enunciated in *Chevron* or in *Skidmore*,[58] or any level of deference in between, a court must "first ask whether congressional intent is clear." *Wilderness Watch & Pub. Employees for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1091 (11th Cir. 2004) (citation omitted). If Congress' intent is clear and unambiguous, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (citing *Chevron*, 467 U.S. at 842-43). Congressional intent is examined by resort to the plain language of the statute, language that is to be read in the context of the entire statutory scheme. *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

The Eleventh Circuit was faced with an analogous situation in *Alabama Power Co. v. United States Dep't. of Energy*, 307 F.3d 1300 (11th Cir. 2002). In *Alabama Power*, the Eleventh Circuit noted that the level of deference it should properly afford the Department of Energy's statutory interpretation was unclear.

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58. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Id. at 1312. Nonetheless, because it found the statute to be clear on the issue, it held that "even if Chevron deference does apply, the Department's interpretation is not saved." *Id.* at 1312-13. Here, for the reasons outlined in Section II.B.5, the undersigned finds that the statute is unambiguous. No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA.

6. *Conclusion*

Ultimately, "[t]he CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters." *Catskill II*, 451 F.3d at 84-85. Notwithstanding Defendants' proposed construction, the Court must adhere "to the balance that Congress has struck and remains free to change." *Id.* at 85. Accordingly, water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES permitting program.

B. The Canals and the Lake are Meaningfully Distinct.

Of course, the determination that water transfers between navigable waters are subject to the NPDES permitting program does not end the Court's inquiry. As the Supreme Court observed in the *S-9 Case*,

although a water transfer may transport pollutants, a NPDES permit is only required if the transfer moves pollutants from one body of water to another, *meaningfully distinct* body of water. In keeping with the bowl of soup analogy (*see S-9 Case*, 541 U.S. at 109-110 (quoting *Catskill I*, 273 F.3d at 492)), the bulk of the evidence presented by the parties concerned whether the canals and the Lake should be viewed as one large bowl of soup or as two separate bowls of soup.

In the *S-9 Case*, the Supreme Court vacated the district court's judgment after finding that, even if the district court had applied the proper test to determine whether two bodies of water are meaningfully distinct, it did so prematurely. *See id.* at 110-11. The Supreme Court so held notwithstanding the undisputed fact that waters were being artificially pumped against gravity and stored in the WCA-3 at unnaturally high levels. Thus, in the absence of the pumps, and in the short-term, the water from the C-11 Canal would not reach the WCA-3. That the Supreme Court nevertheless found that summary judgment was inappropriate teaches that in determining whether two waters are meaningfully distinct, a court should look beyond whether two water bodies are physically distinct at present.

Similarly, in analyzing whether a pollutant would not have entered a body of water but for a water diversion, the Supreme Court called for, at a minimum, a robust "but for" analysis. In the *S-9 Case*, the Supreme Court stated:

> Although C-11 and WCA-3 are divided from one another by the L-33 and L-37 levees, that line appears to be an uncertain one. Because Everglades soil is extremely porous, water flows easily between ground and surface waters, so much so that "[g]round and surface waters are essentially the same thing." . . . C-11 and WCA-3, of course, share a common underlying aquifer. . . . Moreover, the L-33 and L-37 levees continually leak, allowing water to escape from WCA-3. This means not only that any boundary between C-11 and WCA-3 is indistinct, but also that there is some significant mingling of the two waters; the record reveals that even without use of the S-9 pump station, water travels as both seepage and ground water flow between the water conservation area and the C-11 basin.

Id. at 110. The Supreme Court found the hydrologic connections between the waters to be relevant.

It appears, however, that in documenting the hydrologic connections between the waters, the Court was primarily concerned with whether shutting the stations would ultimately result in the waters becoming one. As such, the hydrologic connections were evidence supporting the SFWMD's position that the waters were only distinct *as a result of* the actions of the pump station and other artificial changes to the natural environment. *See id.* at 113 (Scalia, J. concurring) (questioning "the Court's holding . . . that summary judgment was

precluded by the possibility that, if the pump station were shut down, flooding in the C-11 basin might ultimately cause pollutants to flow from C-11 to WCA-3"). Alternatively stated, the Court did not suggest that the fact that waters are hydrologically connected, without more, compels the conclusion that the waters are not meaningfully distinct.

The Court did not define the precise test by which courts should determine whether two waters are meaningfully distinct. *See id.* at 111. The district court, in the *S-9 Case*, had found that "[t]he canal and the Everglades are two separate bodies of water because the transfer of water or its contents from C-11 into the Everglades would not occur naturally." *S-9 Case*, 1999 WL 33494862 at *6. In *Catskill*, the Second Circuit recognized that a water transfer did not require a NPDES permit unless the transfer moved water from one body of water into a separate body of water. However, the Second Circuit did not outline the precise contours of the test for "distinctness," as it found that the bodies of water in question were "utterly unrelated in any relevant sense." *Catskill I*, 273 F.3d at 492.

Here, the undersigned will not attempt to articulate a precise test for the determination of whether two bodies of water are "meaningfully distinct." But, at a minimum, the evidence must demonstrate that pollutants would not have reached the Lake were it not for backpumping, and that the Lake and canals are distinct from one another and would remain distinct if

backpumping ceased. Suffice it to say that, based upon the evidence presented, the Lake is "meaningfully distinct" from the canals.

The following factors support this conclusion:[59] (1) the waters are separated by a physical barrier (the Dike); (2) historically, water generally flowed south from the Lake (in the system's natural state); (3) today, water also generally continues to flow south; (4) there are chemical differences between the Lake and the canals; (5) there are biological differences between the Lake and the canals; (6) the canals are man-made and were cut into bedrock, while the Lake is a natural bowl-shaped water body; (7) when water enters the Lake *via* backpumping, a visible plume may be observed; (8) backpumping canal water into the Lake has a negative impact upon the Lake; (9) the waters are classified differently under the CWA (the Lake is a Class I water body and the canals are Class III water bodies); and (10) the waters that are backpumped into the Lake would not otherwise reach the Lake (in any significant amount, much less in the same quantities) but for the backpumping activities. These factors demonstrate that, in the absence of an extraordinary event, backpumping is the primary means by which pollutants from one body of water (the canals) enter another, distinct body of water (the Lake).

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59. The Court does not determine the appropriate weight to be given to each factor, nor whether any one factor or combination of factors is dispositive, but rather considers the totality of the factors.

That the canals and Lake are hydrologically connected, while relevant, does not compel a different conclusion. Prior to artificial changes to the Everglades system, water generally sheet flowed from the Lake through the Everglades. Moreover, today a large portion of the canal waters originate in the Lake. Finally, the undersigned is mindful that, both historically and today, waters to the south of the Lake could reach the Lake through seepage, wind-blown activities and, on rare occasions, by gravity flow. Thus, if the relevant question were whether the waters are "completely distinct," the Court would necessarily have to answer the question in the negative. However, the Supreme Court has instructed that the proper question is whether the bodies of water are "*meaningfully* distinct," not "completely distinct."

All bodies of water are, to some extent, hydrologically connected. If a hydrologic connection was sufficient to preclude a finding that two bodies of water are meaningfully distinct, then no two bodies of water in the United States, or the world, would be meaningfully distinct and the test would be completely meaningless.[60] The foregoing "connections" between the canal and Lake waters are not so meaningful as to result in a finding that these bodies of water are not meaningfully distinct.

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60. Obviously, certain water bodies share more hydrologic connections than do others. However, although such connections may certainly be relevant, the "meaningfully distinct" analysis should not turn only upon the degree of hydrologic connections between two water bodies.

Appendix D

Although *Dubois* was decided before the *S-9 Case*, a similar hydrologic connection argument was advanced there. In soundly rejecting the argument, the First Circuit noted that "there is nothing in the statute evincing a Congressional intent to distinguish between 'unrelated' water bodies and related or 'hydrologically connected' water bodies." *Dubois*, 102 F.3d at 1298. Moreover, the First Circuit held:

> It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the Pond flows down and eventually empties into the River. But water from the East Branch certainly does not flow uphill into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water from the East Branch to Loon Pond is not an "addition" of water from one of the "waters of the United States" to another. We therefore reject the Forest Service's "hydrological connectedness" proposal.

Id. at 1298.

This case presents facts similar to those in *Dubois*, and a similar result is warranted. Admittedly, and as

noted, some of the canal waters may reach the Lake in the absence of backpumping. However, the vast majority of water that reaches the Lake through backpumping would otherwise remain in the canals or flow (or be pumped) south.

The historically unknown and undefined boundary between the Lake and the marshlands to the south of the Lake does not compel a different result. Certainly, the Supreme Court held that a court must determine whether the two waters are, in fact, one water body that has been artificially divided. Plaintiffs presented sufficient evidence to demonstrate that, historically, the Lake and the waters to the south of the Lake were distinct. That the boundary has been artificially altered and that waters that had previously sheet-flowed across the land are now collected in man-made canals is of no consequence.

Thus, and in light of all of the factors mentioned above and the evidence presented, the canals and Lake are meaningfully distinct.[61]

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61. In this opinion, the undersigned, following the lead of the parties, has reviewed the developmental history of the area, as well as the present situation, in a fair amount of detail. By doing so, the undersigned does not mean to suggest that all of the factors upon which the Court heard testimony are relevant to the "meaningfully distinct" inquiry. Indeed, a good argument may be made that relevant CWA policies (those cited by Plaintiffs and Defendants) are frustrated by a finding that an overly exacting and time-consuming inquiry for each water transfer throughout the country is necessary before determining whether a NPDES permit is required.

C. The SFWMD Is Entitled to Sovereign Immunity.

The Order of November 23, 2005 addressed the parties' cross-motions for summary judgment on the issue of the SFWMD's sovereign immunity. [D.E. 527]. The November 23, 2005 Order denied the motions[62] because material factual issues were in dispute and, at the time, the parties had not had an adequate opportunity to complete discovery. (*November 23, 2005 Order*, p. 11). Now, with the benefit of a fully-developed record, the Court again considers the SFWMD's entitlement to sovereign immunity.

The Eleventh Amendment to the United States Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It is well-settled that the Eleventh Amendment also bars suits against a state initiated by the state's own citizens. *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890); *Employees v. Dep't. of Pub. Health and Welfare*, 411 U.S. 279 (1973); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Moreover, the Eleventh Amendment bars "certain actions against state agents

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62. The order found that the official capacity claims against Henry Dean, Director of the SFWMD, could proceed under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). (*See* [D.E. 527] at 12-16).

and state instrumentalities." *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). The Eleventh Amendment does not bar suits against counties, municipal corporations or other political subdivisions of the state. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

The Eleventh Circuit has embraced a four-part inquiry to determine whether an entity is an instrumentality of the state, entitled to sovereign immunity, or a political subdivision, not entitled to sovereign immunity. *Abusaid v. Hillsborough County Bd. of County Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005). The analysis takes into account: (1) how state law defines the entity; (2) the degree of control the state maintains over the entity; (3) the source of the entity's funds; and (4) who bears financial responsibility for judgments entered against the entity. *Id.* (citing *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003) (*en banc*)). Thus, while an entity's entitlement to sovereign immunity is governed by federal law, the inquiry largely turns on matters of state law. *See id.*

Although the SFWMD's entitlement to sovereign immunity has been considered by courts within the Southern District of Florida on several occasions, no consensus has been reached. Some courts have found the SFWMD to be an instrumentality of the state, immune from suit. *See Grimshaw v. So. Florida Water*

Mgmt. Dist., 195 F. Supp. 2d 1358 (S.D. Fla. 2002); *Nicholas G. Aumen, Ph.D. v. So. Florida Water Mgmt. Dist.*, Case No. 99-8928-Civ (S.D. Fla. Mar. 28, 2000); *Miccosukee Tribe of Indians of Florida v. United States*, 980 F. Supp. 448 (S.D. Fla. 1997); *Bensch v. Metro. Dade County*, 952 F. Supp. 790, 797 (S.D. Fla. 1996); *Indian Trails Water Control Dist. v. So. Florida Water Mgmt. Dist.*, No. 96 Civ. 8528 (S.D. Fla. Dec. 12, 1996). Others have reached the opposite conclusion. *See Miccosukee Tribe of Indians of Florida v. So. Florida Water Mgmt. Dist.*, Case No. 98-6056-Civ, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999); *IT Corp. v. So. Florida Water Mgmt. Dist.*, Case No. 97-8872-Civ (S.D. Fla. July 20, 1998). Indeed, in an unpublished opinion, the Eleventh Circuit observed that the question of whether the SFWMD is an arm of the state or a political subdivision is a close one. *Miccosukee Tribe of Indians v. United States*, 163 F.3d 1359 (11th Cir. 1998) (unpublished), *cert. denied*, 528 U.S. 810 (1999).

An analysis of the relevant four factors, factors that do not all point to the same conclusion, underscores the difficulty that past courts have had in answering this question.

1. *Definition Under Florida Law*

The Eleventh Circuit has emphasized that the "state law definition" prong of the analysis "must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which

liability is asserted to arise." *Abusaid*, 405 F.3d at 1303. The undersigned is mindful that "states have extremely wide latitude in determining their forms of government and how state functions are performed." *Manders*, 338 F.3d at 1309 n.10.

The Florida Legislature has recognized that the management and protection of water resources is of critical importance to the *State*. As such, the Legislature has declared that "[t]he waters *in the state* are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use." Fla. Stat. § 373.016 (emphasis added). The Florida Legislature has further found as follows:

> Because water constitutes a public resource [benefitting] *the entire state, it is the policy of the Legislature that the waters in the state be managed on a state and regional basis.* Consistent with this directive, the Legislature recognizes the need to allocate water throughout the state so as to meet all reasonable-beneficial uses. However, the Legislature acknowledges that such allocations have in the past adversely affected the water resources of certain areas in this state.

* * *

Appendix D

> The Legislature recognizes that the water resource problems of the state vary from region to region, both in magnitude and complexity. It is therefore the intent of the Legislature to vest in the Department of Environmental Protection or its successor agency the power and responsibility to accomplish the conservation, protection, management, and control of the waters of the state and with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to the various water management districts. The department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent practicable, such power should be delegated to the governing board of a water management district.
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> * * *
>
> It is further declared the policy of the Legislature that each water management district, to the extent consistent with effective management practices, shall approximate its fiscal and budget policies and procedures to those of the state.

Fla. Stat. § 373.016 (4)-(6) (emphasis added). Moreover the Legislature found that "the general regulatory and administrative functions of the [water management]

districts herein authorized are of *general benefit to the people of the state.*" Fla. Stat. § 373.503(1) (emphasis added).

The water management districts were created by state law and each district's boundaries are defined by state law. *See* Fla. Stat. § 373.069. State law establishes the governance structure of each district. *See, e.g.*, Fla. Stat. §§ 373.073, 373.076, 373.083, 373.103. Furthermore, the DEP, a state agency, delegates responsibilities to the SFWMD and the other water management districts. (*Trial Tr. Jan. 19, 2006*, 115:22-116:1). The SFWMD has been designated, *by state law*, as the local sponsor for many CERP components. Fla. Stat. § 373.1501. Moreover, the water management districts are listed as "major component units" of the State of Florida in the State comprehensive annual financial report. (*See Trial Tr. Jan. 19, 2006*, 110:15-20; *Def. Ex. 104*).

Notwithstanding that the water management districts manage a State resource, were established by the State, and are governed by laws established by the State, the water management districts have been treated somewhat inconsistently by the state courts and other state laws. For instance, the Florida constitution provides that "[n]o state ad valorem taxes shall be levied upon real estate or tangible personal property." Fla. Const. art. 7 s. 1(a). Special districts, however, are authorized to levy ad valorem taxes. Fla. Const. art. 7 s. 9(a). Because water management districts are special taxing districts, they, unlike the State, may levy ad

valorem taxes. *See* Fla. Stat. § 373.503(2)(a); Fla. Stat. 373.0697; *Barley v. So. Florida Water Mgmt. Dist.*, 823 So. 2d 73, 74 (Fla. 2002).

Likewise, in *Canaveral Port Auth. v. Dep't. of Revenue*, 690 So. 2d 1226 (Fla. 1996) the Florida supreme court was faced with the question of whether Brevard County could impose ad valorem taxes upon the Canaveral Port Authority. In rejecting the port authority's claim of immunity, the court held that

> only the State and those entities which are expressly recognized in the Florida Constitution as performing a function of the state comprise "the state" for purposes of immunity from ad valorem taxation. What comprises "the state" is thus limited to counties, entities providing the public system of education, and agencies, departments, or branches of state government that perform the administration of the state government.

Id. at 1228.

While *Canaveral* did not directly speak to the appropriate classification of "special districts," the dissent interpreted the opinion as holding that special districts such as the SFWMD would not be treated as the "state" for purposes of determining whether they are immune from ad valorem taxation. *Id.* at 1231. As noted by *Grimshaw*, however, the *Canaveral* court's definition of state "includes political subdivisions such

as counties, cities, and school boards which are not entitled to Eleventh Amendment immunity." *Grimshaw*, 195 F. Supp. 2d at 1365.

Conversely, in other contexts, state courts have treated water management districts as arms of the State. *See Dade County v. Nat'l Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984) (the "legislature intended to apply the provisions of chapter 373 to *agencies* dealing with water resources"); *So. Florida Water Mgmt. Dist. v. Taylor*, 676 So.2d 11 (Fla. 3d DCA 1996) (SFWMD entitled to traditional sovereign immunity under state law). Thus, and notwithstanding Plaintiffs' arguments to the contrary, in analyzing the manner in which state law treats water management districts, it is necessary to look beyond mere labels placed upon the SFWMD in other contexts in order to ascertain the essence of the SFWMD under state law.

"[T]he Legislature defines the water management districts as operating under state control to perform a state function with a regional component." *Grimshaw*, 195 F. Supp. 2d at 1364. Indeed, the State has specifically delegated certain responsibilities to the SFWMD so that it may effectively manage the waters within its boundaries, which are set by the State. The Eleventh Circuit has held that the sovereign immunity question "must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Abusaid*, 405 F.3d at 1303. Here, Plaintiffs seek to impose liability upon the SFWMD for the manner in

which it carries out the responsibilities delegated to it by the State and implements state policy. Therefore the first factor weighs heavily in favor of a finding that the SFWMD is immune from suit.

2. *Florida's Degree of Control over the SFWMD*

Florida exerts extensive control over the SFWMD. Statutory controls over the SFWMD include: (1) the nine member governing board of the SFWMD is appointed by the governor of Florida, subject to confirmation by the Florida Senate, Fla. Stat. § 373.073(1)(a); (2) the governor must approve of, and the Florida Senate must confirm, the executive director of the SFWMD (he or she is appointed by the governing board), Fla. Stat. § 373.079(4)(a); (3) the governor has the authority to remove any officer of the SFWMD from office, Fla. Stat. § 373.076(2); and (4) the State auditor general may, at the direction of the governor, audit each water management district's accounts. Fla. Stat. § 373.589.

Moreover, the SFWMD budgeting process, which spans nine months, involves the DEP, the governor, and the legislature. (*Trial Tr. Jan. 19, 2006*, 123:13-124:5). The SFWMD must submit its proposed budget to the DEP, the legislature, and the governor, and the governor has line-item veto authority over the budget. (*Id.*, 107:5-6). The governor's office also reviews the SFWMD's revenue sources. (*See id.*, 132:17-19). Furthermore, the DEP or the legislature may provide written objections

or comments to the proposed budget, and the SFWMD must respond to them. (*Id.*, 107:6-9, 116:2-7).

"[W]here the budget of an entity is submitted to the state for approval, it is presumed for the purposes of evaluating the degree of state control and the entity's fiscal autonomy, that the entity is an agency of the state." *Grimshaw*, 195 F. Supp. 2d at 1366 (citing *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990); *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.), *cert. denied*, 474 U.S. 1007 (1985); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir. 1983)). The State has multiple mechanisms by which it exerts control over the SFWMD. Thus, the second factor, too, strongly favors granting sovereign immunity to the SFWMD.

3. *Source of the SFWMD's Funds and Financial Responsibility for Judgments Entered Against the SFWMD*

Courts have often analyzed the third and fourth prongs of the sovereign immunity inquiry in tandem, as the primary concern of the third prong is whether the state will be required to fund any judgment against the entity in question. *See Shands Teaching Hosp.*, 208 F.3d at 1311; *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990). The undersigned does so here as well.

The SFWMD budget for 2006 was $ 1.1 billion. (*Trial Tr. Jan. 19, 2006*, 129:24-25). General appropriations

from the State accounted for 25 to 30 percent of the budget. (*Id.*, 107:4-5). In addition to general appropriations, the State provides the SFWMD with special appropriations for specific projects. Moreover, the SFWMD receives revenue streams from bond proceeds, gas tax revenues, license plate revenues, and trust fund revenues, among others. (*Id.*, 131:6-12). The funds generated from these revenue streams are deposited in trust funds that the SFWMD may access. (*Id.*, 131:13-18).

The SFWMD also generates a significant portion of its revenues through its own fund-raising activities. (*See Trial Tr. Jan. 19, 2006*, 130:16-21). These sources include funds generated through ad valorem taxation, federal grants, millage rates, and agricultural privilege taxation. (*See id.*). Ad valorem tax rates are set by the governing board of the SFWMD (*Id.*, 142:11-15), although the State imposes a limit upon the SFWMD's ability to impose ad valorem taxes. (*Id.*, 135:5-10). The SFWMD may also issue general obligation bonds and revenue bonds, although it has not issued general obligation bonds in the past. (*Id.*, 135:21-136:10).

Regarding the payment of judgments, the SFWMD carries insurance for losses to its buildings, facilities and aircraft. (*Trial Tr. Jan. 19, 2006*, 136:11-18). The SFWMD also maintains a self-insurance fund which is reserved to pay future claims in the areas of automobile liability, workers' compensation, and general liability. (*Id.*, 136:17:137:3).

Where large judgments have been rendered against the SFWMD in the past, the SFWMD has satisfied the judgments using state trust funds to which it has access (*Trial Tr. Jan. 19, 2006*, 131:19-132:1) and/or out of land act acquisition funds provided for in the SFWMD budget. (*Id.*, 139:3-140:6). If a judgment were sufficiently substantial, the SFWMD would be forced to declare a financial emergency and would have to request additional funds from the State. (*Id.*, 141:9-19). The State of Florida has no legal obligation to satisfy any judgments against the SFWMD.

The State's lack of a legal obligation to satisfy judgments against the SFWMD weighs against finding that the SFWMD is entitled to sovereign immunity. Nevertheless, the State's contribution of a substantial portion of the SFWMD budget, and the fact that it might, as a practical matter, be forced to satisfy any judgments against the SFWMD, counsel against weighing the third and fourth factors too strongly, if at all, against the SFWMD's sovereign immunity.

5. *Conclusion*

The first and second factors of the analysis weigh heavily in favor of the SFWMD's immunity from suit. In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Supreme Court noted that the impetus for adoption of the Eleventh Amendment was "the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* at 48 (citation omitted). It approvingly cited circuit court cases finding

"the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* Notwithstanding some language in the *Hess* opinion to the contrary, the Eleventh Circuit has clarified that although *Hess* weighed the "source-of-payment factor heavily, *Hess* never suggests that for Eleventh Amendment immunity a state treasury drain is required *per se* and *Hess* notes that 'current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system.'" *Manders*, 338 F.3d at 1325. Indeed, in *Manders*, the Eleventh Circuit found that a Georgia sheriff was entitled to sovereign immunity notwithstanding the undisputed fact that the state *would not pay any judgment against him.*

The question of the SFWMD's entitlement to sovereign immunity is a difficult one. Nevertheless, the Court finds that the critical role that the SFWMD plays for the State, the level of control that the State exercises over the SFWMD, the State's substantial contributions to the SFWMD, and the likelihood that the State would likely be forced to satisfy any substantial judgments against the SFWMD, tip the scales in favor of a finding that the SFWMD is immune from suit.

6. *Did the SFWMD Waive its Sovereign Immunity?*

Plaintiffs argue that even if the SFWMD would otherwise be entitled to sovereign immunity, it waived its sovereign immunity by filing a Counterclaim against

Plaintiffs.[63] After commencement of this suit, the SFWMD filed an Answer on August 5, 2002 [D.E. 11]. In its Answer, the SFWMD asserted, as affirmative defenses, that (1) the suit was barred by the Eleventh Amendment; and (2) the claims were barred by the doctrine of sovereign immunity. (*Answer*, p. 5).[64] The SFWMD also asserted a Counterclaim in which it sought (1) a declaration that it did not need a permit for its flow diversion activities at S-2 and S-3; (2) a declaration that the SFWMD is not responsible under the CWA for all pre-existing pollutants introduced to the waters managed by S-2 and S-3 from other sources; (3) a declaration that it is not responsible under the CWA for those pollutants that have already been permitted or are exempt from permitting under the CWA; (4) an award of attorney's fees and costs; and (5) any further relief the Court deems just and proper. On May 22, 2003, the SFWMD filed a substantially identical Answer (including the Counterclaim) to FWF's and Miccosukee's Complaints. (*See* [D.E. 85, 107]).

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63. On January 6, 2006, the Court issued an Order Granting South Florida Water Management District's Motion for Voluntary Dismissal [D.E. 249], dismissing the then-pending Counterclaim. The Order stated, however, that "[t]o the extent that, as Plaintiffs argue, bringing a counterclaim affects an entity's sovereign immunity status, the record is clear that the SFWMD has already asserted counterclaims and the Court ascertains no means by which their dismissal would alter the Court's legal analysis, or Plaintiffs' rights." Thus, the dismissal does not impact the Court's analysis.

64. The SFWMD did not file a motion to dismiss on either ground.

Appendix D

After Plaintiffs amended their pleadings following the Supreme Court's decision in the *S-9 Case* and the re-opening of this litigation, the SFWMD again answered the Complaints by asserting the defenses of Eleventh Amendment and sovereign immunity. (*See* [D.E. 204, 206, 269]).[65] The SFWMD filed a Motion for Summary Judgment on Eleventh Amendment immunity on August 5, 2005 [D.E. 374] and, on the same day, FWF filed a Motion for Summary Judgment on Defendant SFWMD's Affirmative Defenses of Constitutional Bars and Immunities [D.E. 382]. As already stated, the cross-motions were denied as to the SFWMD. Plaintiffs argue that through its litigation tactics, particularly its filing of a Counterclaim, the SFWMD waived its Eleventh Amendment immunity.

Although the Eleventh Amendment generally bars suits against states and their agencies in federal court, there are several exceptions to the rule. Plaintiffs argue that the long-established "waiver" exception applies here. As far back as 1883, the Supreme Court held that "immunity from suit belonging to a state . . . is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction." *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *see also*

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65. The language of SFWMD's Counterclaim differs slightly among its various Answers. The substance of the relief sought, however, remained the same.

Cate v. Oldham, 707 F.2d 1176, 1182 n. 4 (11th Cir. 1983) ("[T]he state by its own action may waive Eleventh Amendment immunity."). A state's waiver of sovereign immunity, however, must be "unequivocally expressed." *Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)).

Although a state may waive its Eleventh Amendment immunity through several means, the relevant question is whether the SFWMD waived its immunity through its affirmative litigation conduct. *In re Burke*, 146 F.3d 1313, 1318 (11th Cir. 1998). It is appropriate to "find a waiver either if the State voluntarily invokes [a federal court's] jurisdiction, or else if the State makes a 'clear declaration' that it intends to submit itself to [a federal court's] jurisdiction." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (internal citations omitted).

Here, the SFWMD found itself in federal court after a suit was filed against it. The SFWMD clearly did not invoke the Court's jurisdiction, at least at the outset of the case. Moreover, in all of its Answers, and in its Motion for Summary Judgment, the SFWMD steadfastly maintained that it was entitled to Eleventh Amendment immunity. Accordingly, the SFWMD has not unequivocally expressed an intent to waive its immunity. Nevertheless, Plaintiffs contend that by filing the Counterclaim, and by otherwise defending the case on

the merits, the SFWMD has implicitly waived its immunity. The undersigned disagrees.

Courts have been inconsistent in determining the effect that a state's filing of a counterclaim has upon its immunity. *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth.*, 744 F.2d 880 (1st Cir. 1984), is the case most often relied upon for the proposition that a state waives its sovereign immunity when it files a counterclaim. In *Paul N. Howard Co.*, the First Circuit held that "where PRASA not only appeared but filed a counterclaim and a third-party complaint, we have little trouble concluding that PRASA voluntarily submitted to the jurisdiction of the federal court, thereby waiving any Eleventh Amendment immunity it might or might not have enjoyed." *Id.* at 886 (citing *Newfield House, Inc. v. Massachusetts Dep't. of Pub. Welfare*, 651 F.2d 32, 36 n. 3 (1st Cir. 1981)); *see also Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359 (D.C. Conn. 1982) (finding that state waived its sovereign immunity by filing counterclaim); *Aldens v. Ryan*, 454 F. Supp. 465, 470 (W.D. Okla. 1976) (finding that state waived immunity by answering complaint without objection, asserting counterclaim, and entering stipulation of fact).

Other courts have reached the opposite conclusion. In *State Contracting and Engineering Corp. v. Florida Dept. of Trans.*, No. 97-7014-Civ, 2000 WL 34220818 (S.D.Fla. 2000), the court found that a state did not waive its immunity by filing a counterclaim. It distinguished the case from *Howard*, and emphasized

that the counterclaim did not assert new issues into the case, it only sought a declaratory judgment, and that, at the time the state filed its counterclaim, the state of the law was such that it appeared that the state could not have successfully asserted an immunity defense. *See* at *4. In affirming the court's ruling on the issue of waiver, the Federal Circuit held "that the filing of a counterclaim during a period when the State was reasonably unsure about the availability of an immunity defense was not a waiver." *State Contracting & Eng'g. Corp. v. State of Florida*, 258 F.3d 1329, 1337 (2001), *cert. denied*, 534 U.S. 1131 (2002).

Other courts have reached similar conclusions. *See Kelley v. Edison Twp.*, No. 03-4817-Civ, 2006 WL 1084217 (April 25, 2006) (state did not waive immunity by filing of third-party complaint, as the action should be viewed as a defensive posture); *Santee Sioux Tribe of Nebraska v. State of Nebraska*, 121 F.3d 427 (8th Cir. 1997) (answering complaint and filing counterclaim did not waive state's immunity because assistant attorney general was not authorized to waive immunity); *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1385 n. 4 (10th Cir. 1997) (affirming district court ruling that state did not waive sovereign immunity by filing counterclaim); *Nat'l. R.R. Passenger Corp. v. Rountree Transp. and Rigging, Inc.*, 896 F. Supp. 1204, 1206-07 (M.D. Fla. 1995) (in order to find a waiver through the state's filing of a counterclaim "state defendants still must announce their waiver of Eleventh Amendment immunity unequivocally").

In evaluating whether a state has waived its immunity, "[c]ourts indulge every reasonable presumption against waiver." *College Sav. Bank*, 527 U.S. at 682 (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). Likewise, "[a] finding of waiver is appropriate only where the state's consent is 'stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"[66] *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark*, 344 F.3d 335, 345 (3d Cir. 2003) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). In other words, the test for finding voluntary waiver is a stringent one. *See id.*

In light of the stringent standard governing the "waiver" inquiry, the Court does not find that the SFWMD waived its immunity in this case. From the outset of this litigation, the SFWMD has asserted the affirmative defenses of sovereign immunity and Eleventh Amendment immunity. Moreover, it filed a motion for summary judgment on the issue. That the SFWMD also defended the case on the merits is not dispositive as the Eleventh Circuit has held that "Eleventh Amendment jurisdictional questions can be raised for the first time on appeal." *Doe*, 410 F.3d at 1349.

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66. Although *Newark* concerned the question of whether the state had waived its immunity by accepting federal funds (as opposed to waiver through litigation conduct), the court's emphasis on the question of whether the state clearly intended to waive its immunity is relevant.

Appendix D

The SFWMD's filing of a Counterclaim is not dispositive. It is certainly true that when a state files a suit in federal court, it is generally considered to have waived its Eleventh Amendment immunity. *See, e.g.*, *Burke*, 146 F.3d at 1319-20; *Gardner v. New Jersey*, 329 U.S. 565 (1947). However, cases holding that the filing of a claim in federal court (or removal of a claim to federal court) waived immunity are primarily concerned with fairness. To state it differently, where a state invokes the power and jurisdiction of a federal court, it may not then use the Eleventh Amendment as a shield when a non-state party seeks to defend itself. As the Supreme Court explained in *Gardner*,

> [i]t is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. . . . If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash.

> When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.

Gardner, 329 U.S. at 573-74 (internal citations omitted).

More than 50 years later, the Court emphasized the fairness considerations implicit in its waiver jurisprudence in holding that where a party removes a case to federal court, it may not subsequently claim Eleventh Amendment immunity. *See Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613 (2002).

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results. Thus, it is not surprising that more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity.

Id. at 619. No such equitable considerations are present here.

Appendix D

The SFWMD was involuntarily brought into federal court by Plaintiffs. In filing a Counterclaim seeking a declaratory judgment, the SFWMD essentially asked the Court to find that Plaintiffs were not entitled to the relief they seek. The SFWMD did not seek to have the Court compel any action on the part of Plaintiffs.[67] Moreover, it is relevant that, as mentioned, the SFWMD's entitlement to sovereign immunity was in doubt at the time this suit was filed (and remains unclear today). Thus, the case is similar to the situation in *State Contracting & Eng'g. Corp.* in that the SFWMD could have been "reasonably unsure about the availability of an immunity defense."[68] *See State Contracting & Eng'g. Corp.*, 258 F.3d at 1337.

Given that (1) the SFWMD has asserted its immunity from the outset, (2) the SFWMD filed a motion for summary judgment on the issue of its immunity from suit; (3) the state of the law on the SFWMD's

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67. The Court leaves undecided, and takes under advisement, whether the SFWMD has waived its immunity to the extent that Plaintiffs are entitled to attorney's fees arising from their defense of the SFWMD's Counterclaim. *See In re Burke*, 146 F.3d at 1319-20 (holding that the state's waiver of sovereign immunity was narrow).

68. Plaintiffs argue that the SFWMD could not have been reasonably unsure about the defense in light of the decision in *Grimshaw*. *See* 195 F. Supp. 2d 1358. The undersigned disagrees, as *Grimshaw* conflicted with the holdings of other courts within this District. A different question would have been presented had the Eleventh Circuit previously held that the SFWMD was entitled to sovereign immunity.

entitlement to immunity is uncertain; and (4) the SFWMD's assertion of immunity has not resulted in any unfairness to Plaintiffs, the Court finds that the SFWMD has not waived its immunity.

IV. CONCLUSION

The problems facing Lake Okeechobee and the Everglades are far from simple. No one suggests that requiring the SFWMD and/or its Director to obtain a NPDES permit prior to backpumping will solve these problems or even substantially contribute to a solution. However, in enacting the CWA, Congress imposed certain requirements upon all entities that discharge pollutants into navigable waters. As in any statutory analysis, it is not the function of the Court to second-guess Congress' wishes, but rather, to seek to discern them where the meaning of a statute is at issue.

Plaintiffs have requested that the Court require the SFWMD and/or its Director to obtain a NPDES permit. It was after the close of trial that the EPA issued its Proposed Rule, proposing an amendment to the NPDES regulations that would specifically exempt all water transfers from the NPDES permitting scheme. Moreover, there is no dispute that, at present, the SFWMD may not cease its backpumping operations because massive flooding would result. At the close of the trial, it remained unclear exactly what the nature of any prospective relief, if granted to Plaintiffs, and the scope of any obligations imposed upon Defendants, should be.

The parties did address these matters generally in their post-trial submissions. In apparent recognition that the issue of the extent of any remedies to be awarded Plaintiffs had not been adequately addressed at trial, or in the pre- or post-trial briefs, the FWF and Miccosukee suggest that the Court order SFWMD to promptly apply for a NPDES permit, and "then proceed to a remedy phase at which the Court may determine the appropriate penalty, *see* 33 U.S.C. § 1319(d), and any injunctive relief the Court deems appropriate." (*Prop. Findings of Fact and Conclusions of Law* [D.E. 592] at 114-115). U.S. Sugar devotes considerable discussion in its post-trial submission to the question of remedy and injunctive relief, and argues that Plaintiffs have not carried their burden of demonstrating irreparable injury, the inadequacy of legal remedies, and that the need for protection from flooding does not outweigh Plaintiffs' need for injunctive relief. (*See Corrected Copy of Proposed Findings* [D.E. 596]).

In accordance with the foregoing and Federal Rule of Civil Procedure 58, the Court will, by separate document, enter judgment for Plaintiffs, declaring that, in the absence of a NPDES permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the CWA. Entry of a final judgment is deferred, however, pending further proceedings to consider Plaintiffs' requests for injunctive relief. The Court will retain jurisdiction over the parties to ensure compliance with the judgment and any subsequent remedial measures.

For all of the foregoing reasons, it is

ORDERED AND ADJUDGED as follows:

1. The parties are to submit a proposed joint scheduling report, suggesting the nature and timing of additional proceedings and written briefing concerning the entry of a permanent injunction.[69] The report shall be filed by no later than December 22, 2006. If the parties are in disagreement as to any proposal, they are to so indicate in the joint report.

2. Any of the foregoing conclusions of law which may represent findings of fact are adopted as findings of fact.

DONE AND ORDERED in Chambers at Miami, Florida this 11th day of December, 2006.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

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69. In light of the Court's finding that the SFWMD is entitled to sovereign immunity, any injunction would be directed to the SFWMD's executive director.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED AND FILED MAY 7, 2010, DENYING THE PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13829

D.C. Docket No. 02-80309 CV-CMA

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION,

Plaintiffs-
Counter-Defendants-
Appellees
Cross-Appellants,

FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,

Plaintiff-
Counter-Defendant
Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Intervenor-Plaintiff-
Counter-Defendant-
Appellee
Cross-Appellant,

Appendix E

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-
Counter-Claimant-
Cross-Appellee,

CAROL WEHLE, Executive Director,

Defendant-Appellant,

UNITED STATES OF AMERICA,
U.S. SUGAR CORPORATION,

Intervenor-Defendants-
Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before DUBINA, Chief Judge, TJOFLAT, EDMONDSON, BIRCH, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, PRYOR, and MARTIN, Circuit Judges.

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure), the Suggestion of Rehearing En Banc is **DENIED**.

APPENDIX F — RELEVANT STATUTES

Pertinent Clean Water Act Provisions

Section 301, 33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * *

Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

* * * *

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

> (1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311 (b)(1)(A) and section 1311 (b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority

ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314 (a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety * * *.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314 (a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection.

* * * *

Appendix F

Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311 (a) of this title****

* * * *

(*l*) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to

require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff * * * *

* * * *

Section 404, § 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * *

Appendix F

Section 502, 33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean

(A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or

(B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well,* * *.

Appendix F

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means

> (A) any addition of any pollutant to navigable waters from any point source,
>
> (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Appendix F

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants

(A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and

(B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

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APPENDIX G — RELEVANT REGULATION

40 C.F.R. § 122.3

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also § 122.47(b)). This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(d) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances).

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to

aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

(f) Return flows from irrigated agriculture.

(g) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.44(m).

(h) The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

> (1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.
>
> (2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for

example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.